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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 521

STEAMSHIP "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, CLAIMANT, PETITIONER,

vs.

THE RHEINSTROM BROTHERS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1934.

CERTIORARI GRANTED DECEMBER 3, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

RHEINSTROM BROTHERS COMPANY, Libellant,

against

Steamship "ANSALDO SAN GIORGIO I," SOCIETA NAZIONALE NAVIGAZIONE, Claimant

DOCKET ENTRIES

1922

Mar. 1. Filed libel and stipulation for costs.
Mar. 7. Filed claim and stipulation for costs.
June 5. Filed stipulation for value.
Nov. 13. Filed answer.
Nov. 14. Filed note of issue and notice of trial.

1923

July 3. Filed order substituting Loomis & Reubush.
Oct. 30. Filed answer to interrogatories.

1925

July 16. Filed order for commission to Naples, Italy.
July 23. Filed interrogatories.
Aug. 1. Filed order for commission to Naples, Italy.
Aug. 1. Filed order for commission to Genoa, Italy.
Aug. 5. Filed cross-interrogatories to E. & V. Tervoli.

[fol. 2]

Aug. 21. Filed re-direct-interrogatories to V. Tervoli.
Aug. 21. Filed re-direct-interrogatories to E. Tervoli.
Sept. 5. Filed stipulation extending time of claimant to file cross-interrogatories.
Sept. 15. Also to except to re-direct-interrogatories.
Oct. 16. Filed cross-interrogatories (M. Bosco).
Oct. 16. Filed cross-interrogatories (Crosa Giacomo).
Oct. 24. Filed interrogatories (G. Bagurio).
Oct. 24. Filed interrogatories (M. Bosco).
Oct. 24. Filed interrogatories (O. Imbronta).
Oct. 24. Filed interrogatories (A. Benini).
Oct. 24. Filed interrogatories (F. Criscuolo).

1925

Oct. 24. Filed interrogatories (C. Giacomo).
Oct. 24. Filed interrogatories (M. Razetto).
Oct. 26. Filed stipulation settling interrogatories of E. & V. Tervoli.
Oct. 26. Issued commissions to Naples, Italy.
Oct. 26. Filed stipulation settling interrogatories of "Martino Rogeto et al."
Oct. 26. Issued commission to Genoa, Italy.
Oct. 26. Filed stipulation settling interrogatories to "Francesco Criscuolo et al."
Oct. 26. Issued commission to Naples, Italy.
Dec. 17. Filed commissions from Naples, Italy.

1926

May 6. Filed commissions from Genoa, Italy.

1927

Sept. 26. Filed order permitting libellant to withdraw commissions (Naples and Genoa, Italy) from Court files—Thacher, J.
Oct. 4. Winslow, J.—Case tried. Libellant—one witness and 7 exhibits—adjourned to Oct. 5.
[fol. 3] Oct. 5. Winslow, J.—trial resumed. Libellant—six witnesses. Argued and submitted.
Oct. 10. Winslow, J.—decree for libellant.
Oct. 20. Filed interlocutory decree with reference to John E. Morrissey—Winslow, J.
Oct. 21. Filed affidavit in opposition to form of interlocutory decree.
Nov. 9. Filed order and notice allowing appeals from interlocutory decree—Mack, J.
Nov. 9. Filed assignment of errors.
Nov. 9. Filed bond on appeal—approved (Nat. Sur. Co.).
Nov. 15. Filed order extending time to file record on appeal to Dec. 20, 1927 (Clerk).
Dec. 21. Filed order extending time to file record on appeal to Jan. 20, 1928 (Clerk).

1928

Jan. 10. Filed order extending time to file record on appeal to Jan. 31, 1928 (Clerk).
Feb. 4. Issued certificate on appeal to C. C. A.
June 20. Filed mandate from C. C. A. Decree affirmed with costs in C. C. A. taxed at $25.00. Refer to John E. Morrissey, Commissioner—Winslow, J.

1927
1929

Feb. 13. Filed order for commission to Rome, Italy—Knox, J.
Feb. 15. Filed interrogatories to A. Kiefer.
Feb. 15. Filed interrogatories to U. Gasperini.
Feb. 28. Filed cross-interrogatories to U. Gasperini.
Feb. 28. Filed cross-interrogatories to A. Kiefer.
Mar. 5. Filed stipulation setting interrogatories.
Mar. 5. Issued commission to Rome, Italy.
[fol. 4] May 7. Filed commission from Rome, Italy.
May 16. Filed order permitting Bigham, Englar, Jones & Houston to withdraw commission (Rome, Italy) from Court files—Bondy, J.

1930

Nov. 28. Filed deposition of Rudolph Johnson, San Francisco, Cal.
Dec. 23. Filed order to remove deposition of R. Johnson—Woolsey, J.

1931

Oct. 26. Filed notice of motion to propound interrogatories. Memorandum endorsed. Motion granted—Bondy, J.
Oct. 31. Filed order granting motion to propound interrogatories—Bondy, J.
Dec. 8. Filed answers to interrogatories.

1932

Oct. 18. Filed commission's report—Minutes, exhibits and interrogatories.
Oct. 22. Filed exceptions to commissioner's report.
Dec. 23. Filed note of issue—motion to overrule exceptions returnable Dec. 27, 1932.

1933

Jan. 30. Filed notice of motion for order overruling exceptions to Commissioner's report.
Jan. 30. Filed opinion #7624, Patterson, J. Exceptions to the measure of damages sustained. Other exceptions over-ruled.
Feb. 23. Filed order over-ruling exceptions 4, 5. 6, 7 and 8 to Commissioner's report, sustaining exceptions 1, 2, 3 to report. Parties to submit memoranda of damages—Patterson, J.
Mar. 14. Filed report of commissioner.
Mar. 14. Filed stipulation fixing damages at 16,488 lira.

1933

[fol. 5] Mar. 14. Filed stipulation fixing damages at 200 pounds or $789.50 and cancelling previous stipulation.

Mar. 14. Filed memorandum #7674—Patterson, J.—libel dismissed without costs.

Mar. 23. Filed order dismissing libel without costs. Commissioner's fee fixed at $1500.—Patterson, J.

April 10. Filed note of issue—motion for additional security returnable April 14.

April 14. Filed notice of motion for an order directing claimant to file additional stipulation for costs in amount of $2000.00—motion denied without prejudice—Bondy, J.

June 1. Filed petition and order allowing appeal—Coxe, J.

June 1. Filed assignment of errors.

June 5. Filed undertaking for costs on appeal $250.—Indemnity Ins. Co. of N. A.

June 23. Filed order extending time to file record to August 23, 1933.

June 30. Filed additional docket fees.

[fol. 6] In United States Circuit Court of Appeals for the Second Circuit

No. 82-357

Rheinstrom Brothers Company, Libellant,

against

Steamship "Ansaldo San Giorgio I," Societa Nazionale Navigazione, Claimant

Stipulation re Printing of Transcript of Record

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that the printing of the transcript of record, filed in the Clerk's office of this Court by the claimant herein on its appeal from the interlocutory decree entered by the libellant upon the decision of the District Court holding the claimant liable for the amount of libellant's damages, which transcript of record was offered by the libellant as an exhibit in the proceedings

before the Special Commissioner appointed to ascertain the amount of libellant's damages, may be omitted from the transcript of record to be filed on the present appeal, and that the said transcript of record on the first appeal may be handed to the Court upon the argument of the pending appeal, and that counsel for either party may in their briefs, or upon the argument of the pending appeal refer [fol. 7] to any matter contained in the record on the first appeal in this case.

Dated, New York, July 14, 1933.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Loomis & Ruebush, Proctors for Claimant.

The foregoing stipulation is hereby approved and ordered filed.

Manton, United States Circuit Judge.

[fol. 8] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Hearing Before Commissioner Held December 23, 1930

Before John E. Morrissey, Esq., Commissioner.

Hearing held at the office of the Commissioner, 90 West Street, New York City, 3:45 P. M., December 23, 1930.

APPEARANCES

John E. Morrissey, Esq., Commissioner.

Bigham, Englar, Jones & Houston, Esqs., F. H. Prem, Esq., Counsel, for the Libellant.

Loomis & Ruebush, Esqs., P. A. Donohue, Esq., Counsel, for the Claimant.

OFFERS IN EVIDENCE

Mr. Prem: I offer in evidence the depositions of August Kiefer and Umberto Gasperini, together with the Commission's stipulation settling interrogatories, and order for the issuance of the Commission, together with the envelope

[fol. 9] returning depositions from the American Consul at Rome, showing that they were filed in the United States District Court on May 7, 1929.

Mr. Donohue: I offer in evidence the cross-interrogatories of August Kiefer and Umberto Gasperini.

Commissioner: Received and marked Libellant's Exhibit No. 1.

Mr. Prem: I offer in evidence the deposition of Rudolph G. Johnson.

Mr. Donohue: I offer in evidence the cross-examination in the deposition of Rudolph G. Johnson.

Commissioner: Received and marked Libellant's Exhibit No. 2.

It is stipulated that the depositions of the two witnesses, August Kiefer and Umberto Gasperini, were returned by the American Consul and filed in the United States District Court for the Southern District of New York on May 7, 1929.

Mr. Prem: I also offer in evidence the testimony of all of libellant's witnesses as contained in the transcript of record of this case filed in the United States Circuit Court of Appeals for the Second Circuit, together with the seven (7) libellant's exhibits referred to in said record.

Mr. Donohue: I offer the cross-examination of those witnesses.

Commissioner: Received and marked Libellant's Exhibit No. 3.

Mr. Prem: I also offer three consular invoices—invoice numbers appearing on the back thereof being Nos. 526, 1312, 1503.

[fol. 10] It is stipulated between counsel that libellant's exhibit, consisting of photostatic copies of three consular invoices, may be received in evidence with the same force and effect as though the originals had been subpœnaed from the files of the United States Custom House, and that photostatic copies may be used in lieu of the originals, and are true copies of the consular invoices on file at the Custom House.

Commissioner: Received and marked Libellant's Exhibit No. 4.

It is stipulated and agreed that October 22, 1928 is the date that claimant's petition for certiorari was denied in the United States Supreme Court.

Mr. Donohue: I wish to put in an objection to Claimant's Exhibit 3, consisting of invoices shown in the printed record. I object to their introduction because they contain a lot of statements by someone, possibly the shipper. They are unsworn and we have had no opportunity to cross-examine as to what is stated in them. I object to the introduction of them in so far as any reliance may be placed on the truth of what they contain. I also object to the photostatic copies of the consular invoices on the same ground.

Mr. Prem: I wish to point out that the objection now made by Mr. Donohue was also made by Mr. Loomis on the trial in the District Court, and the Court at that time stated, at page 42:

"I will reserve decision on the motion; and in the mean-[fol. 11] time, they may be marked and received in evidence, subject to the objection and possible exclusion by the Court."

The Court thereafter made no further rulings and they were accordingly accepted as evidence. These exhibits were made a part of the printed record which was considered by the Court of Appeals on claimant's appeal in this case.

Mr. Donohue: As to that I would like to point out that possibly the Court received the exhibits referred to on the basis specified in the objection by Mr. Loomis, in that specifically, the objection to their introduction in so far as any reliance might be placed upon the truth of what they contain.

Commissioner: When do you wish to file briefs?

Counsel agree that briefs are to be filed and exchanged by both parties by February 15, 1931, and reply briefs to be filed and exchanged by March 1, 1931.

It is stipulated that the dates appearing in the statement contained in the record on appeal, are true and correct and the aforesaid statement is made a part of the record in this proceeding.

Mr. Prem: I offer in evidence the Libel and Answer contained in Libellant's Exhibit No. 3.

Mr. Donohue: No objection.

Commissioner: Received.

[fol. 12] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Hearing Before Commissioner, Held December 7, 1931

December 7, 1931—2:30 P. M.

OFFERS IN EVIDENCE

Commissioner: A motion was made before me to re-open the case in order to put in additional evidence and motion was granted. Then an application was made by the libellant to the District Court for leave to serve certain interrogatories, which motion was granted after submission of briefs and argument. Interrogatories have been served upon respondent and respondent has since filed its answers to those interrogatories.

Mr. Prem: I wish to offer in evidence the notice of motion, the order of the Court on the motion, and the answers of the claimant to libellant's interrogatories.

Mr. Donohue: Objection. This hearing was reopened to give libellant opportunity to prove that notice of survey was given. These papers have nothing to do with any notice of survey. At most they are only mere notices of [fol. 13] claim and therefore are immaterial on that issue of notice of survey.

Commissioner: Received.

Mr. Donohue: Exception.

CARL GELLER, a witness called on behalf of the Libellant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Prem:

Q. What is your full name, Mr. Geller?

A. Carl Geller.

Q. What is your occupation?

A. Translator.

Q. How long have you been engaged in that occupation?

A. 30 years.

Q. What has been your training and study with respect to the Italian language?

A. I learned it in school. I learned it afterward for myself, travelling in Italy, and have translated it for the last thirty years, and have been engaged as translator by the firms of Chubb & Son and Appleton & Cox.

Q. Are you familiar with commercial terms?

A. I am.

Q. I show you three documents and ask you to state what they are.

A. Those are invoices.

Q. Are they translations of invoices which I now show you, being Exhibit 7?

A. Yes, that is the translation of that one.

Q. They are all marked Exhibit 7. There are three invoices.

A. That is the translation of this one. Yes, and that is the translation of this one.

Q. Are those translations correctly made from the original exhibits which I now show you?

A. Yes, sir.

Mr. Prem: I offer them in evidence.

Mr. Donohue: There is no objection.

[fol. 14] Commissioner: That is a photostatic copy of the original. Received.

Mr. Prem: That is all Mr. Geller. Thank you.

Mr. Prem: It is stipulated and agreed by and between counsel that the rate of exchange prevailing on September 2, 1920 was .04665, the date September 2, 1920 being the date of the arrival of the vessel at the port of Philadelphia, and that this rate of exchange shall be used by the Commissioner for computing damages, unless the Claimant submits further proof of the rate of exchange satisfactory to the Commissioner.

Mr. Donohue: Objection. That ties me up completely.

Mr. Prem: The rate of exchange on July 5, 1920 was .0615 and for September 2, 1920, .04665.

Commissioner: Your contention is that I should use the invoice value as of the date of the failure to deliver.

Mr. Donohue: I withdraw that. I agree to the invoice value as of the date of shipment. I want to get proof as to what they did with the shipment. He can't recover for damages and keep the value of the remnant too. We are entitled to a deduction as to any amount that they have saved. Thus far you haven't anything before you as to the proof of the damage, except the mere appraisals of percentages stated by Johnson, the surveyor. I want to get the evidence as to exactly what they did with the shipment.

Mr. Prem: I will tell you if it is any value to you.

Mr. Donohue: All right, what did they do with it?

Mr. Prem: They used it themselves.

(Hearing adjourned to January 8, 1932.)

[fol. 15] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Hearing Held Before Commissioner, January 26, 1932

Hearing held at the office of the Special Commissioner, No. 90 West Street, New York City, January 26, 1932.

Before John E. Morrissey, Esq., Special Commissioner.

APPEARANCES

John E. Morrissey, Esq., Special Commissioner.

Messrs. Bigham, Englar, Jones & Houston (Mr. Prem), for the Libellant.

Messrs. Loomis, Williams & Donohue (Mr. Donahue), for the Claimant.

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be taxable.

[fol. 16] JOHN E. DEREDON, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Prem:

Q. What business are you in?
A. I am in the importing business.
Q. Importing what kind of commodities?
A. Importing fancy groceries and fruits in brine.
Q. How long have you been engaged in that business?
A. About eighteen years.
Q. What firm were you connected with in August and September, 1920?
A. I was connected with Ricardo Gomez & Dietlin Company of this city.
Q. Are they in business at the present time?
A. No, they are not in business now.
Q. When did they cease doing business?
A. Well, they became inactive in 1923, I believe—1922 or 1923.
Q. What was your connection with that firm?
A. I was Secretary and Treasurer of the company.
Q. With what firm are you connected at the present time?
A. John E. deRedon, Inc.
Q. Are they engaged in the same business?
A. The same business.
Q. How many importers were there of cherries in brine in August and September, 1920, in New York City?

Mr. Donahue: I object to that unless the witness's knowledge is shown.

The Commissioner: He can name the concerns that he knows.

Q. What concerns do you know that were in business importing cherries in brine at that time?
[fol. 17] A. Well, you mean the number of them or just the names of them?
Q. The names of them.
A. At that time, there was the American Trading Company, Antolini & Company—that is all I remember of actual importers.
Q. Can you give us an idea of the volume of business done by your firm in August and September, 1920?
A. You mean in dollars and cents?
Q. No, in number of barrels imported and sold.
A. You mean cherries alone?

Q. Cherries in brine, yes.

A. I think we handled about 10,000 barrels that year.

The Commissioner: Were there other concerns engaged in the importing business other than those you have named?

The Witness: Yes, there were a number of agents—foreign representatives—but not importers—not to my recollection.

Q. Can you give us an idea how your firm ranked with others with respect to the volume of business handled in barrels of cherries in brine?

Mr. Donahue: Objected to unless the witness has some means of checking.

Objection sustained.

Q. Do you know the volume of business transacted by the other firms which you referred to?

A. Yes, I think they did between——

Mr. Donahue: I object to that.

(Question repeated.)

A. About 15,000 barrels.

[fol. 18] Q. You were one of their competitors, were you not?

A. We were.

Q. The business that you transacted ranged along the Atlantic Seaboard, that is you didn't sell exclusively in New York City?

A. Oh, no, we sold to the manufacturers distributed throughout the country—Chicago, Peoria——

Q. Does that include Philadelphia?

A. Philadelphia; Cincinnati; Covington, Kentucky; Boston.

Q. I show you three invoices, and ask you if you are familiar with the commodities referred to there (handing witness translations of Libellant's Exhibit 7, consisting of three invoices).

A. Yes, they all refer to cherries in brine, the commodity I have been handling.

Q. Did you sell that commodity during the year 1920?

A. I did.

Q. Have you made any search for your records of sales in the year 1920, August and September, of the firm you were connected with at that time?

A. Well, of course, I didn't have access to those records.

Q. I say, have you made a search for them?

A. I say I didn't have access to them—to the records of Rheinstrom Brothers Company?

Q. Yes, that is of the sales made during that time.

A. Yes.

Q. Have you found any records of sales?

A. No.

Q. Have you any recollection of the sales prices prevailing in August and September, 1920, for cherries in brine imported from Italy?

A. Yes, I remember selling cherries at around 10 cents a pound.

Q. Was there any trade journal or other publication giving quotations of the market price of cherries in brine?

A. No, not cherries in brine. It is a very limited com-

[fol. 19] modity, and the transactions are limited.

Q. What factors did you take into consideration in establishing a selling price for cherries in brine in New York City, as an importer—I am referring now to August and September, 1920?

A. Still back in 1920?

Q. Yes.

A. We take the invoice value, cost of merchandise, freight and insurance to New York, and usually add 20 per cent to figure overhead and profit.

Q. State whether or not there was in existence in New York a market value for cherries in brine, similar to that prevailing for commodities such as potatoes or apples?

Mr. Donahue: I object to that, I don't know what——

The Commissioner: I will sustain the objection to the question in the form it is put.

Q. Is it not a fact that there is but one type of cherries in brine?

Mr. Donahue: Objected to as calling for a conclusion.

Q. State how many types of cherries in brine there are as to quality.

Mr. Donahue: I object to that on the ground that this witness has not been shown to be familiar with all qualities and types of cherries in brine.

Objection overruled.

A. There are whole cherries in brine, and broken, namely [fol. 20] known as "Scarto"—we are talking as of 1920 now.

Q. What are known as prime cherries in brine?

A. The whole cherries in brine.

Q. Do I understand you to say that there is but one quality of cherries in brine?

A. That is right.

Q. And when they are broken, then they are a second quality of "Scarto"?

A. They are called broken or "Scarto," or rejects—three names, broken or Scarto or rejects.

Q. In the course of your experience as an importer of cherries in brine, did you ever receive any shipments in a damaged condition?

Mr. Donahue: Objected to as immaterial.

The Commissioner: I will take it subject to connection.

A. I have.

Q. In what manner was the extent of damage ascertained?

Mr. Donahue: Objected to.

Objection sustained.

Q. What was the customary method among importers of cherries in brine, of ascertaining the extent of damage to cherries?

Mr. Donahue: Objected to.

Objection sustained.

Exception.

Q. What is your opinion as to the effect of a sale at public auction to demonstrate loss on a shipment of damaged cherries in brine?

[fol. 21] Mr. Donahue: Objected to on the ground that his opinion as to the effectiveness of a public sale is merely a conclusion.

Objection sustained.

Exception.

Q. What was the market in New York at that time for the sale of cherries in brine?

Mr. Donahue: Objected to unless the witness's knowledge is shown.

Objection overruled.

A. 10 cents a pound.

Q. Not the price, but was it a limited market or a broad market?

Mr. Donahue: Objected to as calling for a conclusion.

Q. Were there many buyers or few buyers of cherries in brine?

A. There were very few buyers.

Q. Do you know Rudolph C. Johnson, the cargo surveyor?

A. I do.

Q. What is his reputation among the importers of cherries in brine in New York, as to his qualifications as a cargo surveyor?

Mr. Donahue: Objected to.

Q. Has Mr. Johnson ever made surveys for damage to cherries in brine, imported by the firm with which you were connected?

A. He has.

Q. How frequently did this occur in the course of your eighteen years' experience?

Mr. Donahue: Another objection I have is: we are inter-
[fol. 22] ested in Johnson's qualifications as of 1920, not as of eighteen years. I want to know whether Johnson made any surveys for his company prior to or in 1920.

The Commissioner: You can cross-examine as to that.

(Question repeated.)

A. I have made three surveys with Mr. Johnson personally, in 1919, 1920 and——

Q. What method did Mr. Johnson adopt in ascertaining the extent of damage to those cherries?

Mr. Donahue: Objected to.

Objection sustained.

Q. Have you ever attended, with Mr. Johnson, on any other surveys of other firms on damaged merchandise?

A. I have been on the dock when he has been making surveys.

Mr. Donahue: I move to strike that out as not responsive, and furth r it is immaterial whether he was on the dock when Mr. ohnson was making surveys, that is of no help to us.

The Commissi ner: I will let it stand for what it is worth.

Q. What opin on did you form of Mr. Johnson's qualifications as a ca go surveyor of cherries in brine, as a result of your cor tact with him on these occasions you refer to?

Mr. Donahue: I object to that, what the witness's opinion of Mr. Johnson's qualifications may be can't help us.

[fol. 23] Objection overruled.

(Question repeated.)

A. He was a very able man to decide damage on this sort of commodity.

Mr. Donahue: I renew my objection and move to strike out the answer.

Objection overruled and motion denied.

Exception.

Q. The selling price which you have testified to, of 10 cents for cherries in brine in New York, would that also in your opinion be the selling price of the same commodity in Philadelphia in August and September, 1920?

Mr. Donahue: Obj ted to unless the witness's knowledge of conditions in the market in Philadelphia is shown.

Mr. Prem: He has stated he sells them all over the country.

The Commissioner: Is there any difference in the market value of that type of cherries in Philadelphia and New York?

The Witness: No, sir.

Q. Will you again please state to what cities you sold cherries in brine in the year 1920 and about the months of August and September. 1920?

A. New York City, Rochester, Boston, Baltimore, Philadelphia, Cincinnati, Covington, Kentucky; Peoria, Illinois; Chicago, Illinois and Portland, Oregon.

Q. What margin of profit did you, as an importer, figure on when you sold cherries in brine at 10 cents a pound, as you have testified?

[fol. 24] The Commissioner: He has already testified he had a 20 per cent. to cover overhead and profit.

Cross-examination.

By Mr. Donahue:

Q. What was your position in 1920?

A. My position with Ricardo Gomez & Dietlin Company?

Q. Yes.

A. Secretary and Treasurer or Vice-President and Treasurer, I think it was Secretary and Treasurer. I was an officer of the company anyhow.

Q. How long had you been connected with the company as of 1920—how long prior to 1920?

A. Since 1915.

Q. In what capacity did you begin with the company?

A. As Secretary.

Q. What business had you been in prior to 1915?

A. I had been with the American Trading Company, one of our main competitors.

Q. What business did they do?

A. They were in the cherries in brine business, as well as many other commodities.

Q. They were general importers?

A. Yes.

Q. They were not restricted to cherries in brine?

A. No.

Q. Neither was Ricardo Gomez & Dietlin Company?

A. No.

Q. Did you do any of the actual selling?

A. I did.

Q. In 1920, how many barrels of cherries did you handle, personally?

A. You mean in selling or importing—I handled the entire department on cherries in brine.

Q. How many barrels of cherries in brine did you actually sell in 1920?

A. I have already testified that we—well, that is—I guess I sold them all—I think I handled them all myself.

[fol. 25] Q. That is to say about from 10,000 to 15,000 barrels?

A. No, I testified 10,000 we handled, and the American Trading Company handled 15,000.

Q. You then personally sold 10,000 barrels in 1920?

A. Well, I don't know if I sold every barrel, but I handled the selling—the importing and selling of 10,000 barrels of cherries. I didn't go out and peddle them separately.

Q. Do my questions irritate you?

A. Yes, under those conditions.

Q. If you don't care to answer the questions—

A. I don't say I don't care to answer them. I said I handled the entire department. I imported them and sold them.

Q. Then your testimony is, you sold 10,000 barrels in 1920?

A. That is right.

Q. Now, to what concerns did you sell them—do you remember?

A. I remember some. You want the names of them?

Q. If you can.

A. I sold some to Vandyk & Reeves, Brooklyn; Keystone Fruit Products, Cincinnati; Liberty Fruit & Cherry, Covington, Kentucky; Star Fruit Company, Portland, Oregon; Stickney & Poor, Boston; International Fruit Products, Cincinnati—delivered out of Philadelphia; Hungarford, Smith, Rochester, New York. That is all I can remember now.

Q. And the 10,000 barrels were divided among all those various parties?

A. That is right.

Q. Do you remember what cherries you sold in the month of August, 1920—how many of the 10,000 barrels you sold in August, 1920?

A. No, I can't state the exact quantity, but I would say the bulk of them, because that is the time contracts are made.

[fol. 26] Q. What are these concerns to whom you sold the cherries—are they general dealers—wholesalers?

A. They are manufacturers of Maraschino cherries.

Q. All of them?

A. All of them, similar to Rheinstrom Brothers.

Q. Did you have anything to do with the cherries in question here—these Rheinstrom cherries involved in this suit?

A. I saw them on the dock.

Q. You saw the cherries on the dock?

A. Yes.

Q. You had no direct connection with Rheinstrom or with the cherries?

A. No, sir.

Q. What dock was it—New York or Philadelphia?

A. I referred to the New York shipment, because we had a shipment on the same steamer, that I recollect.

Q. You had a shipment on this very steamer?

A. If I am not mistaken.

Q. How many barrels?

A. I can't remember the quantity.

Q. Can you approximate it?

Mr. Prem: If you have to refresh your recollection, you may refer to your papers.

A. I think it was around 250 barrels—on the "Ansaldo".

Q. Where had those cherries been purchased, if you remember?

A. In Italy.

Q. Do you remember from what concern?

A. No.

Q. What type of cherries were they?

A. They were whole cherries in brine.

Q. And what quality?

A. Prime—at that time there were only two kinds—good or bad—broken, you might call them, as I testified before.

Q. Were these cherries one or the other?

[fol. 27] A. These were good cherries. The ones I am almost positive we had on the same ship.

The Commissioner: You refer to his own cherries?

Mr. Donahue: His own cherries.

Q. Your cherries were then turned out good?

A. We had prime cherries, yes.

Q. And those were not damaged?

A. I think we had a claim against the company which was paid.

Q. For how much?

A. A few barrels—I don't remember exactly.

Q. About how much do you suppose the claim amounted to?

A. It was a small claim—I had quite a mix-up at that time with the Steamship Company, I don't just recollect the story—I haven't access to the records, but I know we had quite a mix-up with McDonald & Truda at the time—the Steamship Company's agents.

Mr. Donahue: I move to strike out the statement about McDonald & Truda as agents, as a conclusion.

Motion denied.

Exception.

Q. If bad cherries are brought into contact with good, will the bad contaminate the good?

A. In the same barrel?

Mr. Prem: I object to the question, because there was nothing said about that on direct examination. If you want to make the witness your own for that purpose——

Q. When the bad and the good are in the same lot.

[fol. 28] Mr. Prem: I object to that, because I asked no questions on that on direct examination. If he wants to make the witness his own——

Mr. Donahue: This is an expert witness. I want to know how much of an expert he is. I am just testing him on that.

Objection overruled.

Exception.

A. You will have to define your question more clearly as to the same lot. They can't contaminate through the barrels. If you mean bad cherries in a barrel and there are damaged—I don't know what you mean by the question—same lot—I can't answer.

Q. I said in my question, contact.

The Commissioner: In the same container?

Mr. Donahue: I said in contact, so that would cover it.

A. In the individual container, yes.

Q. And if bad cherries come in contact with good cherries, the bad will contaminate the good?

A. That is the answer to the question, isn't it, that I have just made, yes.

Q. Were you ever employed by Rheinstrom Brothers?
A. No.
Q. Have you ever done business with them?
A. I have.
Q. Will you state what the business was?
A. I have made a number of sales to them at different times throughout my experience.
Q. Are they customers of yours now?
A. No.
Q. Were they at any time—or of you or of any concern [fol. 29] by whom you were employed?
A. Each time I made them a sale I would consider them a customer, yes.
Q. Are you on friendly terms with the organization?
A. Rheinstrom Brothers?
Q. Yes.
A. No.
Q. Do you know anybody in the organization?
A. I know Mr. James Rheinstrom.
Q. Did you discuss this case with Mr. Prem?
A. Before coming here?

Mr. Prem: Certainly he did.

A. (Continuing:) Certainly, he invited me, asked me to come over here, I haven't been subpoenaed, this was a friendly argument, I understood.

Q. You say you were on three surveys with Mr. Johnson in 1919 and 1920?
A. To the best of my recollection, yes. I know Mr. Johnson, I know others of the surveyors.
Q. How many of the surveys of the three were in 1920?
A. I can't say that distinctly. I remember meeting Mr. Johnson on the dock going over merchandise, appraising it, or watching him adjust the damage at three distinct times.
Q. Were you interested in those surveys?
A. Absolutely—on our own merchandise.
Q. Are you a surveyor?
A. Oh, no.
Q. You don't pretend to be a surveyor?
A. No. If I was asked, I might estimate damage for somebody else on cherries—I don't know much about it.

Re-direct examination.

By Mr. Prem:

Q. Mr. Donahue asked you if you were on friendly terms with Rheinstrom Brothers. Is it a secret why you aren't on friendly terms with them—would you care to answer or [fol. 30] wouldn't you care to answer it?

A. Yes, certainly—no, it is not a secret. He is what we call an "in and outer".

Q. What is the meaning of that term?

A. Usually buys direct to avoid paying profits and commissions.

Q. And was a large part of your income at that time derived from sales on cherries?

A. Oh, yes.

Q. And as a result of Mr. Rheinstrom's method of dealing, he avoided paying you those commissions or others engaged in a similar business?

A. Yes, that is right.

Q. During the times that you were engaged with Mr. Johnson in attending surveys of damaged cherries in brine, how did Mr. Johnson examine the damaged cherries?

Mr. Donahue: I object to that as immaterial, whatever way Mr. Johnson examined on that occasion isn't important here.

The Commissioner: I don't see it, but I will take it for my own information for what it is worth.

Mr. Donahue: Then you reserve my right to move to strike it out after?

The Commissioner: Yes.

(Question repeated.)

The Commissioner: State the method employed by Mr. Johnson in ascertaining the nature and extent of damage.

The Witness: The usual manner established in the trade, by a tryer through the bung hole, bringing out a couple of pounds of cherries. They line all the barrels up, that are damaged, and they have a long wire which is called a tryer. It is a long wire with a lot of prongs or hooks on the end, [fol. 31] go down into the barrel and catch onto the stems of the cherries, this side and that side, lay them out and estimate the amount of dryness, we might say, or damage to the cherries.

Q. How many cherries would that bring out by such method from each barrel?

A. Anywheres from half a pound to a couple of pounds. If a barrel is very much damaged, you have to go way down to the bottom, they are all dry sometimes—a total loss.

The Commissioner: And that is the method used in——

The Witness: Generally.

The Commissioner: To ascertain the nature and extent of the damage to the individual barrels?

The Witness: Yes, that is right.

Mr. Donahue: My objection was to the witness stating that this is the usual and customary method employed by surveyors.

Objection overruled.

Exception.

Q. Have you ever observed other cargo surveyors in examining damaged cherries in brine, other than Mr. Johnson?

A. Oh, yes.

Q. What method did they follow?

A. The same method. There is only one way to get at them.

[fol. 32] WALTER J. SHIELS, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Prem:

Q. What business are you in Mr. Shiels?

A. Importing business.

Q. Of what commodities?

A. Principally cherries in brine.

Q. How long have you been engaged in that business?

A. About fifteen years—fourteen or fifteen years.

Q. In New York City?

A. That is right.

Q. Were you engaged in that business in August and September, 1920?

A. I was.

Q. How many importers were there, of cherries in brine at that time?

A. At that time?

Q. Yes, to your knowledge.

A. Three or four, perhaps.

Q. What kind of a market was there in New York City for cherries in brine at that time?

A. What kind of a market?

Q. Yes, with respect to the number of purchasers—many or few?

A. I don't quite understand your question.

Q. Were there many prospective purchasers of cherries in brine in August and September, 1920, or were there few?

Mr. Donahue: If that is confined to the witness's knowledge, I don't object, but in the present form I do object.

Q. Was there a limited market or a broad market in New York for the sale of cherries in brine at that time?

A. Well, the market was limited to a certain number of buyers of cherries every year—probably 10,000 or 15,000 [fol. 33] barrels were bought at that time, I don't just remember that.

Q. That 10,000 or 15,000 relates to your experience?

A. Yes.

Q. Have you any recollection of sales prices prevailing in New York City for cherries in brine in 1920, August and September?

A. So newhere in the neighborhood of 10 cents a pound.

Q. I show you three invoices, and ask you to state if you are familiar with that commodity (handing witness translations of Libellants' Exhibit 7, consisting of three invoices).

A. Yes, these are invoices covering the purchase of cherries in brine.

Q. The commodity which you say sold for 10 cents a pound in New York City—is that the same or different from the commodity referred to in those invoices?

A. I would say it is the same—cherries in brine.

Q. What company were you with in 1920, August and September?

A. I was with Ricardo Gomez & Dietlin Company.

Q. The same company Mr. DeRedon was with?

A. That is right.

Q. Do you know Mr. Johnson, a cargo surveyor employed by Kohler, Kemp & Kohler?

A. Yes, I know Mr. Johnson.

Q. Did you ever accompany Mr. Johnson on any of his surveys of cherries in brine?

A. A number of times.

Q. Will you describe the method he employed in ascertaining the extent of damage to cherries in brine?

Mr. Donahue: Objected to.

Objection overruled.

Exception.

[fol. 34] A. Why, when a shipment of cherries arrived, we would make an inspection on the dock—somebody from our office. If we found any damaged barrels, we would immediately notify the Insurance Company, who would in turn appoint a surveyor. Very often it was Kohler, Kemp & Kohler. They in turn would designate one of their men, and as a rule the formality was they would ask us to set aside any damaged barrels—by damaged barrels meaning barrels that the brine had leaked out of or cherries come out of—been totally lost out of the barrel—and we would make an appointment with the surveyor and go to the dock, remove the bungs in the barrels, and the surveyor would proceed to determine what percentage of damage was done to that particular barrel.

Mr. Donahue: Each one—each particular barrel?

Q. How would he go about it, what would be the method he would use to make his examination?

A. In order to see the cherries, he would insert the instrument—he used to have a wire with a lot of hooks on it—put that down into the barrel and catch hold of a lot of the cherries, bring them up, bring up a couple of handfuls, determine the amount of shrinkage, amount of damage to the cherries, and he would base his finding on that.

Q. How many times do you estimate you accompanied Mr. Johnson on such missions?

A. Well, to state a different number of times I have accompanied Mr. Johnson would be difficult. I have probably accompanied Mr. Johnson ten or twelve times.

[fol. 35] Q. Have you ever accompanied any other surveyors on similar occasions?

A. Oh, yes, yes.

Q. Did their method of ascertaining the damage differ from that method employed by Mr. Johnson?

Mr. Donahue: Objected to as immaterial.
Objection overruled.
Exception.

A. Why, no different particular method.

Q. Did they insert a wire or wire prong in the barrel and withdraw the cherries?

A. As a rule. Of course, if the barrel were all smashed up and no cherries left, there would be no doubt as to the loss.

Q. There would be no purpose of inserting a tryer then?

A. No.

Cross-examination.

By Mr. Donahue:

Q. Did you see the cherries that were involved in this suit—the barrels or the cherries?

A. Not to my recollection.

Q. You didn't go with Mr. Johnson on this survey?

A. No, I wouldn't have anything to do with this particular shipment as to the examining of them, no.

Q. Did you have any cherries off that same ship?

A. Well, that is rather difficult to answer. We have had cherries coming in steamer after steamer, I couldn't remember that far back, possibly we did.

Q. You are not a surveyor, are you, Mr. Shiels?

A. No, sir.

Q. What was your position in August and September, 1920?

A. I was with the firm of Ricardo Gomez & Dietlin Com- [fol. 36] pany, and my duties were to follow up the incoming shipments, as to the clearance, the deliveries on the dock, the inspection by the buyers, and in case of a damage, adjustment with the surveyor, follow those movements right on. In other words, I followed the movement of the shipment from the time it was advised aboard until it reached its destination.

Q. Were you the only one in the office who had those duties?

A. Why, I did most of the work, most of the outside work.

Q. So that if there had been a shipment of cherries consigned to you on the same steamer that brought the cherries

here in question, you undoubtedly would have been the man to go over to the pier to inspect them and receive them?

A. Very likely.

Q. How long had you been with the company in August and September, 1920?

A. I had been with the company since its inception, and I don't recall the year the company was formed.

Q. You say you have been in the business fourteen or fifteen years?

A. Handling of cherries—about fourteen years. I have been in this business about twenty years.

Q. What, in August and September 1920, were your duties?

A. As I described before.

Q. You didn't have anything to do with the selling of cherries?

A. Very little—in some instances, yes, but very little.

Q. How many barrels of cherries did you sell in August, 1920?

A. The month of August?

Q. Yes.

A. I couldn't answer that, I don't know.

Q. How many in the month of September, 1920?

A. I couldn't answer that. We usually calculated our [fol. 37] sales by the season, and the season would run from May until perhaps September—the selling season. We would have cherries coming in all the time.

Q. You don't remember having participated in any actual sales in August and September, 1920?

A. Oh, I was present a number of times when conversations were on.

Q. I want to know now whether you personally sold any cherries in brine in barrels in August and September, 1920, and if you did sell any, how many barrels you sold and to whom you sold them.

A. I don't remember that.

Q. How many kinds of cherries are there shipped in brine?

A. Well, at that time there were prime cherries, whole prime cherries, and another variety, inferior variety, known as Scarto.

Mr. Prem: That makes two, does it?

The Witness: Yes, that makes two, that is right.

Q. If bad cherries come in contact with good cherries, they will contaminate the good, will they not?

Mr. Prem: I object to that question on the ground that this witness has not been qualified as a surveyor of cherries.

The Commissioner: I think you should include whether they are in brine or not.

Mr. Donahue: I am not interested in them in brine. I am interested in them before they are put in brine. That is the very point of my question.

Mr. Prem: If you want to make him your witness, go ahead.

[fol. 38] Objection overruled.

Exception.

Q. There is no doubt about it, Mr. Shiels, that if bad cherrier——

A. I can't conceive of the bad cherries coming in contact with the good ones.

Q. I assume that the bad cherries came in contact with the good ones, there is no doubt that they are going to contaminate the good?

A. If they are in brine, I should have my doubt about it, yes.

Q. I am not asking about brine.

A. We are speaking of cherries in brine.

Q. I didn't state anything about in brine. Isn't it a fact, Mr. Shiels—is there any doubt about it—that if bad cherries come in contact with good cherries, that in the passage of time they will contaminate the good cherries?

Mr. Prem: Objected to, it isn't specified where the cherries get in contact, whether they are in brine or not in brine, whether in containers or not in containers, and I ask that the question be made clear and explicit on that point. It is too general and vague entirely.

Objection overruled. I think it is self evident that any bad fruit coming in contact with good fruit, it will contaminate the good fruit.

Question repeated.

Mr. Prem: I object to the question on the further ground that the description "bad cherries" is not made more explicit, whether he means broken cherries, Scarto cherries or decayed cherries.

[fol. 39] All right, deteriorated cherries.

Mr. Prem: I still object to the question.

The Commissioner: The word "bad" indicates to me "decayed".

Q. I am using the word deterioration.

A. I am afraid I can't answer that question in that form.

The Commissioner: What is a Scarto cherry?

The Witness: A Scarto cherry is a stained cherry as a rule—stained—it has been stained by the weather, stained or cracked. Perfectly healthy cherry put in brine, used for——

Mr. Prem: Is it a decayed cherry?

The Witness: No, it is not.

Q. What is a spotted cherry?

A. A spotted cherry is a cherry that won't bleach out in the bleaching of the fruit, in the bleaching process.

Mr. Prem: Is that a decayed cherry?

The Witness: No, sir, stained or spotted cherry, we know them as.

Q. Is that less value than a prime cherry?

A. Yes.

Re-direct examination.

By Mr. Prem:

Q. Is that known as a second quality—a spotted cherry?

A. A spotted cherry—at that time the quality of spotted cherries didn't exist—there were two qualities—the whole prime cherries and the Scarto cherries.

[fol. 40] Q. The Scarto cherry was a class by itself?

A. The Scarto cherry was a class by itself.

Re-cross-examination.

By Mr. Donahue:

Q. What would you call a cherry that is in the process of decay—however slight that might be, however little the decay may have progressed?

A. It would be a decayed cherry—decayed fruit.

Q. And you haven't any doubt, have you, that if such decayed fruit is brought into contact with sound cherries, that the decayed fruit will contaminate the good?

A. In the fresh state, yes, but not in the brine.

Q. I didn't ask you about brine. I said if they do come in contact now—not in brine—there is no doubt about it?

A. I will say yes, in the fresh state there is no doubt about that, we all know that.

[fol. 41] LIBELLANT'S EXHIBIT 1

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE RHEINSTROM BROTHERS COMPANY, Libellant,

against

S. S. "ANSALDO SAN GIORGIO I," SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant

Interrogatories Addressed to August Kiefer, a Witness on Behalf of the Libellant, and Answers Thereto

First Interrogatory: What is your name, age and present occupation?

Answer: My name is August Kiefer. I am fifty-six years old and I am occupied by acting as Agent for the Rheinstrom Brothers Company.

Second Interrogatory: What was your occupation in May, June and July, 1920, and for how long had you been so employed?

Answer: I was acting as Agent for the Rheinstrom Brothers Company and have been doing so since 1903.

Third Interrogatory: If you state that you were employed by The Rheinstrom Brothers Company, state in detail the nature of such employment.

[fol. 42] Answer: If the Rheinstrom Brothers Company needs any European product I will be informed of it. Then I demand prices from the manufacturers or packers and give such prices to the Rheinstrom Brothers Company. I make the contracts with the packers in the name of the Rheinstrom Brothers Company. Then I am present at the

packing places to supervise the preparing, packing and weighing of the products. Furthermore, I have to take care of the payments and these are made against documents only after being approved by myself. I am occupied mostly by the cherry business and principally I have to be on the watch for the shipping of good quality fruits, for the condition of the containers and for the right weights.

Fourth Interrogatory: Did you have any connection with a lot of 2,955 barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Societa Esportazione Agricola Ligure, and shipped at Naples on the steamship "Ansaldo San Giorgio I," in July, 1920, consigned to the First National Bank of Cincinnati at Philadelphia?

Answer: I am fully informed concerning the lot of 2,955 barrels of cherries in brine purchased by the Rheinstrom Brothers Company from the Societa Esportazione Agricola Ligure, as I made the purchase, inspection, shipment of, and payment for these cherries. These cherries were not loaded in Naples, but in Genoa.

Fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

[fol. 43] Answer: After having made the purchase contract I had to supervise the preparing of the cherries so that the packers were given only good and sound quality fruits, well sorted and well sulphured; the packing, so that the barrels were well cleaned, in good order, and after being filled that they were well closed; the weighing, so that the right weight was given; the shipping, so that no barrel was loaded without having been inspected; that no barrel leaked, and that they were loaded with the bung on the upper side.

Sixth Interrogatory: State, if you know:

(a) Where said cherries were prepared for shipment.

Answer: Said cherries were prepared for shipment in Savona at the factory of the Societa Esportazione Agricola Ligure, and in the property of the former Societa Chinotti Company, which is at a place near the sea; in Modena at the factory of Carlo Venturelli. A few of the barrels were packed at various places, such as Voghera, Verona, etc. These barrels were all opened, thoroughly inspected and the weight controlled at this place near the sea in Savona.

(b) When said cherries were prepared for shipment.

Answer: The said cherries were prepared during the period from about the end of May up to the middle of July, 1920.

Seventh Interrogatory: Were you present when said cherries were prepared for shipment?

Answer: Yes.

Eighth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the process [fol. 44] or processes through which the cherries were put in preparing them for shipment, enumerating, in order, the various steps taken until they were placed in containers for delivery to the railroad.

Answer: The cherries from the market or the country were first sorted and the spotted fruit was eliminated. Then the cherries were sulphured, by which process they are preserved for years. After being sulphured (in a closed room) the cherries were taken out, sorted again and put in the barrels on the scale. The weighing was supervised by myself or my assistant, Mr. Gasperini. Then the barrels were placed in the depot where they were filled with water. Before being shipped they were again inspected by me and marked with a blue sign A K which has always been a guarantee to the Rheinstrom Brothers Company that they were receiving the right quality of cherries, the right weight, and that the barrels were in good condition. This depot has been in the packing place, either in their room, yard, or garden. Special attention was given to see that the barrels were well closed and loaded on the cars and that wherever loaded they were placed with the bung on the top.

Ninth Interrogatory: Did you supervise their preparation for shipment?

Answer: Yes. I supervised the preparation of the cherries.

Tenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your supervision.

Answer: I supervised the preparation of these cherries [fol. 45] from the beginning up to the shipment as said in my first answer.

Eleventh Interrogatory: Did you inspect said cherries?
Answer: Yes.

Twelfth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.

Answer: Before leaving each barrel was inspected to see if the cherries were in good state and also if the barrels showed no leakage. If contents and barrel were at my full satisfaction I personally marked A. K. This mark has always been a control wherever I saw the barrels, in the depot, in the cars, in the port and on the steamer, that the Rheinstrom Brothers Company received inspected goods.

Thirteenth Interrogatory: Did anyone assist you in your work of supervision and inspection?
Answer: Yes.

Fourteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state:

(a) The name of said party.
Answer: My assistant has been Mr. Umberto Gasperini.

(b) The part taken by said party in said supervision and inspection.

Answer: Mr. Gasperini assisted in the supervision of all things by doing the same work as myself. Sometimes, if I had to make a short trip from one place to another, Mr. Gasperini had the supervision alone. However, I have [fol. 46] always personally made the last inspection to see that, before shipment, the cherries had not fermented, that the proper solution was used and then I marked the barrels with my name to make sure that they had been finally inspected.

Fifteenth Interrogatory: State if you know whether said cherries were weighed.

Answer: Said cherries were weighed at the places where they were packed.

Sixteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first

weighed and then the containers and their contents weighed together and the tare subtracted.

Answer: Generally the containers were first weighed, remaining on the scale they were filled and the containers and their contents were weighed together. Then all barrels were filled with cherries up to a net content which has always been the same at the same packing places.

Seventeenth Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?

Answer: Yes. The weighing has been controlled personally either by myself or my assistant.

Eighteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: The barrels have been filled at least with the relative net weight as stated in the bill, 792 barrels each [fol. 47] of 130 kilos and 2,163 barrels each of 132 kilos.

Nineteenth Interrogatory:

(a) State, if you know whether the amount of cherries described in your answer to the last preceding interrogatory was placed in containers and made ready for shipment on cars.

Answer: I know that the amount of cherries as described in my eighteenth answer were placed in containers and made ready for shipment on cars.

(b) If your answer to "(a)" is in the affirmative, describe the condition of said containers.

Answer: The condition of said containers was good. Other containers would have been refused. Wherever a barrel showed leakage it has been repaired or it has been changed.

(c) Were said containers making up said shipment of 2,955 barrels of different capacities?

Answer: Said containers making up said shipment of 2,955 barrels have been of about the same capacity.

Twentieth Interrogatory: If your answer to the Nineteenth Interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: The capacity of the 792 barrels packed with 130 kilos net is the same as the others. The difference of the 2 kilos comes from the fact that the Modena cherries are larger and harder, taking more space. The quality was good and sound.

[fol. 48] Twenty-first Interrogatory: Did you have any connection with a lot of 466 casks and/or barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Ghisetti Antonio & Cia., and shipped at Genoa on the steamship "Ansaldo San Giorgio I", in July, 1920, consigned to order at Philadelphia?

Answer: I purchased this lot of cherries for the Rheinstrom Brothers Company from Ghisetti Antonio & Cia. and had to supervise the preparing, weighing, and shipping of these cherries and to make the payment therefor.

Twenty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

Answer: With these cherries I had to do the same duties as described in my fifth answer.

Twenty-third Interrogatory: State if you know:

(a) Where said cherries were prepared for shipment.

Answer: Said cherries were prepared for shipment at the factory of Ghisetti Antonio & Cia. in Modena.

(b) When said cherries were prepared for shipment.

Answer: They were prepared about the beginning of June, 1920.

Twenty-fourth Interrogatory: Were you present when said cherries were prepared for shipment.

Answer: Yes.

Twenty-fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the pro-
[fol. 49] cess or process through which the cherries were put in preparing them for shipment, enumerating, in order, the various steps taken until they were placed in containers for delivery to the railroad.

Answer: Same as stated in my eighth answer.

Twenty-sixth Interrogatory: Did you supervise their preparation for shipment?

Answer: Yes.

Twenty-seventh Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your supervision.

Answer: I supervised the preparation of said cherries from the beginning up to the shipping as outlined in my fifth answer.

Twenty-eighth Interrogatory: Did you inspect said cherries?

Answer: Yes, I inspected these cherries personally.

Twenty-ninth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.

Answer: Same as stated in my twelfth answer.

Thirtieth Interrogatory: Did anyone assist you in your work of supervision and inspection?

Answer: Not in Modena.

Thirty-first Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state: (a) the name of said party; (b) the part taken by said party in [fol. 50] said supervision and inspection.

Answer: Answered under the thirtieth interrogatory.

Thirty-second Interrogatory: State if you know whether said cherries were weighed.

Answer: The cherries were weighed at the factory of Ghisetti Antonio & Cia., Modena.

Thirty-third Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first weighed and then the containers and their contents weighed together and the tare subtracted.

Answer: These cherries were weighed before being placed in containers for shipment.

Thirty-fourth Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?

Answer: Yes, I controlled the weight of said cherries.

Thirty-fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: The whole weight of the lot was 56,935 kilos but, as there was some spotted fruit because they were not thoroughly sorted by the girls, I agreed with the seller to accept the lot with a net weight of 55,895 kilos, as also billed.

Thirty-sixth Interrogatory: State, if you know, whether the amount of cherries described in your answer to the last [fol. 51] preceding interrogatory was placed in containers and made ready for shipment on cars.

Answer: I know that said weight of 55,895 kilos was placed in containers and made ready for shipment on cars.

(b) If your answer to (a) is in the affirmative, describe the condition of said containers.

Answer: The containers were new barrels in very good condition.

(c) Were said containers making up said shipment of 466 casks and/or barrels of different capacities?

Answer: The barrels were of a different capacity.

Thirty-seventh Interrogatory: If your answer to the Thirty-sixth Interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: These cherries were packed as follows:

21 barrels with 230 kilos net fruits each—4,830 kilos
222 barrels with 182 kilos net fruits each—40,404 kilos
15 barrels with 147 kilos net fruits each—2,205 kilos
121 barrels with 35 kilos net fruits each—4,235 kilos.

All these 379 barrels of 51,674 kilos contained sound fruit of good quality.

[fol. 52] 8 barrels with 182 kilos net fruits each—1,456 kilos
79 barrels with 35 kilos net fruits each—2,765 kilos.

These 87 barrels of 4,221 kilos contained second quality fruit (sound fruit but somewhat spotted).

Thirty-eighth Interrogatory: Did you have any connection with the lot of 845 barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Societa Esportazione Agricola Ligure and shipped at Naples

on the steamship "Ansaldo San Giorgio I" in July 1920, consigned to order at New York?

Answer: I had full connection with this lot of 845 barrels of cherries purchased by the Rheinstrom Brothers Company from Societa Esportazione Agricola Ligure, I having made the purchase, inspection, shipment of, and payment for them.

Thirty-ninth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

Answer: With these cherries I had to do the same as described in my fifth answer.

Fortieth Interrogatory: State, if you know:

(a) Where said cherries were prepared for shipment.

Answer: I know that a part were prepared in the property of Luigi Ceretto in Maddaloni Inferiore, another part in the property of Ant. (?) Napoletano in Baiano.

[fol. 53] (b) When said cherries were prepared for shipment.

Answer: Said cherries were prepared from about end of May until middle of July, 1920.

Forty-first Interrogatory: Were you present when said cherries were prepared for shipment?

Answer: I was present, as was also my assistant.

Forty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the process or processes through which the cherries were put in preparing them for shipment, enumerating, in order, the various steps taken until they were placed in containers for delivery to the railroad.

Answer: Same processes as stated in my eighth answer.

Forty-third Interrogatory: Did you supervise their preparation for shipment?

Answer: I supervised their preparation for shipment, with the aid of my assistant.

Forty-fourth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your supervision.

Answer: I supervised the preparation of these cherries from the beginning up to the shipment as stated in my fifth answer.

Forty-fifth Interrogatory: Did you inspect said cherries?
Answer: Yes.

[fol. 54] Forty-sixth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.
Answer: I did the same as described in my twelfth answer.

Forty-seventh Interrogatory: Did anyone assist you in your work of supervision and inspection?
Answer: Yes.

Forty-eighth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state:
(a) The name of said party.
Answer: Mr. Umberto Gasperini.

(b) The part taken by said party in said supervision and inspection.
Answer: Same as stated in my fourteenth answer.

Forty-ninth Interrogatory: State if you know whether said cherries were weighed.
Answer: Said cherries were weighed at their packing places in Maddaloni and Baiano.

Fiftieth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first weighed and then the containers and their contents weighed together and the tare subtracted.
Answer: Same as stated in my sixteenth answer.

Fifty-first Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?
[fol. 55] Answer: Yes. The weighing has been controlled personally either by myself or my assistant.

Fifty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: Each of these 845 barrels were packed with 132 kilos of cherries.

Fifty-third Interrogatory:

(a) State, if you know, whether the amount of cherries described in your answer to the last preceding interrogatory was placed in containers and made ready for shipment on cars.

Answer: I know that the total weight of 111,540 kilos of cherries were placed in containers and made ready for shipment on cars.

(b) If your answer to (a) is in the affirmative, describe the condition of said containers.

Answer: The containers were in good condition.

(c) Were said containers making up said shipment of 845 barrels of different capacities?

Answer: The containers making up said shipment of 845 barrels were of about same capacity.

Fifty-fourth Interrogatory: If your answer to the Fifty-third Interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: All barrels had about the same capacity. The cherries in these 845 barrels were good quality and total [fol. 56] weight amounted to 111,540 kilos. Each barrel contained 132 kilos of cherries.

Cross-Interrogatories Addressed to August Kiefer, and Answers Thereto

First Cross-interrogatory: If in answer to the "Fourth" interrogatory you say you recall "2,955 barrels of cherries in brine * * * shipped at Naples on the steamship 'Ansaldo San Giorgio I, in July, 1920," state if you saw the said cargo at Naples prior to being loaded on the aforementioned steamer.

Answer: I do not remember, but I probably saw these barrels on the pier before being loaded. However, this shipment was made in Genoa and not in Naples as stated by you.

Second Cross-Interrogatory: State (a) if you saw the said steamer in the port of Naples.

Answer: I do not remember. (Referring to Genoa.)

(b) If you saw her being loaded with the barrels in question.

Answer: I do not remember. (Referring to Genoa.)

State (c) Whether the said vessel was then lying at a pier or at anchor.

Answer: I do not remember. (Referring to Genoa.)

(d) If the said vessel loaded the said barrels directly from a pier or from lighters.

Answer: I do not remember. (Referring to Genoa.)

[fol. 57] (e) In what position the said steamer was lying.

Answer: I do not remember. (Referring to Genoa.)

Third Cross-interrogatory:

(a) Did you act as Rheinstrom's agent or representative in negotiating with the shipper for the buying of the said 2955 barrels?

Answer: Yes.

(b) What did you have to do with the buying or purchasing of the said barrels?

Answer: I obtained the seller's quotations on these barrels, then I cabled the prices to the Rheinstrom Brothers Company for their confirmation and, after it was received, I concluded the contract covering this purchase.

Fourth Cross-interrogatory: Did you act as agent or representative for Rheinstrom Brothers in connection with the packing or inspection of the said 2955 barrels?

Answer: Yes, I supervised the packing and inspected the said 2,955 barrels as the Agent of the Rheinstrom Brothers Company.

(b) Who were you employed by in June, July and August, 1920?

Answer: I was employed by the Rheinstrom Brothers Company.

(c) Were you employed by the shipper of the said 2955 barrels or were you employed by Rheinstrom Brothers or were you employed by someone else, and, if so, state who?

Answer: I was employed by the Rheinstrom Brothers Company.

[fol. 58] Fifth Cross-interrogatory:

(a) Did you see any or a part of the 2955 barrels while they were still empty, that is, before the cherries in brine were put into them?

Answer: Yes, I saw most of the barrels when they were empty.

(b) If so, describe in full detail their condition.

Answer: The barrels were in good condition, otherwise they would have been rejected by me.

(c) Had they ever been used before as containers of any other liquids?

Answer: Part of the barrels had been previously used as containers for vegetable oil.

(d) Prior to having the cherries in brine placed in them had they been cleaned, and, if so, describe in the fullest detail how they had been cleaned?

Answer: Before the cherries in brine were placed in the containers the insides of these barrels were cleaned by heat, so that the vegetable oil was fully taken out of the wood, and then the barrels were paraffined. It was prescribed to the seller of the cherries that they be placed in barrels that had been previously used only once.

(e) If you state that they had been cleaned state what, if anything, was done to them before the cherries were put into them?

Answer: The barrels were paraffined.

(f) Describe in detail how they were prepared to receive the cherries.

Answer: As stated under (d) and (e), immediately above.

(g) State in full the reasons why they were prepared as you have described them.

[fol. 59] Answer: So that the cherries would not absorb the oil.

(h) Give the date when you first saw these barrels and describe their condition at that time.

Answer: I first saw these barrels between the 5th and 10th of June, 1920. Their condition was good.

(i) Give the date when the packing commenced and describe in detail the condition of the barrels at that time.

Answer: I first saw the barrels when the packing commenced, as stated under letter (h) of this question.

Sixth Cross-interrogatory:

(a) Give the date when the packing of the said 2,955 barrels was commenced.

Answer: The same date as mentioned in reply to question No. 5 (h).

(b) Give the date when the packing of the said 2955 barrels was finished.

Answer: The packing was finished between the beginning and the middle of July, 1920.

(c) Give the date when the heads of said barrels were finally put in or they were finally closed and ready for shipment.

Answer: After the final inspection by myself and after they had been marked A K by myself, between June and July, 1920.

(d) Describe in full detail how they were closed and made ready for delivery to the carrier.

Answer: We saw that the right sized bung was used and the same tightened with the use of burlap.

[fol. 60] Seventh Cross-interrogatory:

(a): In what locality, giving the name of the city, town or district, were the barrels in question packed?

Answer: A part of the barrels in question were packed in Modena and partly in Savona. The said barrels were packed at the factory of Carlo Venturelli in Modena, further at factory of the former Societa Chinotti and at factory of Societa Esportazione Agricola Ligure in Savona.

(b) Were the said barrels packed in a building, such as a factory, shed, or the like, and, if so, describe such place in full detail?

Answer: The cherries were packed partly in buildings and partly outside of buildings in the factory ground.

Eighth Cross-interrogatory:

(a) State when you first saw the cherries prior to their being packed in the barrels in question.

Answer: I first saw the cherries when they were placed in the barrels in question.

(b) Were they green, that is, fresh from the trees, or—

Answer: Most of the cherries I saw when green and the balance when they were sulphured.

(c) Were they dried or otherwise prepared for packing?

Answer: The cherries were sulphured and sorted.

(d) Was anything done to the said cherries prior to being packed and—

Answer: The cherries were sulphured and sorted.

(e) If so, describe in detail just what was done to them before they were placed in the barrels.

[fol. 61] Answer: As stated in reply to question 8 (c) and (d).

Ninth Cross-interrogatory: Were the said cherries subjected to (a) heat, or—

Answer: No.

(b) Chemicals of any kind, prior to being placed in the barrels?

Answer: Only treated with sulphur.

Tenth Cross-interrogatory:

(a) After the cherries were put in the barrels was any solution of any kind placed over them, and, if so—

Answer: After the cherries were put in the barrels, these barrels were filled with water and sulphured water.

(b) state of what it was composed, that is

(c) give the chemical analysis of such solution, and

(d) describe how this solution was put over the cherries.

Answer: The solution consisted of sulphured water and it is possible that in 1920 a quarter of a gallon or less of this sulphured water has been strengthened with bysulphite or sulphurous anhydride. Before closing the barrels, about three kilos of salt were placed in each to satisfy customs requirements, and to complete the brine.

Eleventh Cross-interrogatory:

(a) Was the same quantity of cherries put in each of the said 2,955 barrels and if not—

Answer: No.

(b) State what quantity was put in each barrel.

[fol. 62] Answer: 792 barrels each contained 130 kilos. 2,163 barrels each contained 132 kilos.

(c) What kind of measure, scales or other implement was used to measure or weight out the quantity of cherries that was placed in each barrel, and—

Answer: A scale was used.

(d) describe the same in detail.
Answer: Centesimal weight.

Twelfth Cross-interrogatory:

(a) How many pounds or kilograms of cherries were placed in each barrel?
Answer: As stated in No. 11 (b).

(b) How many pounds or kilograms of liquid was placed over the cherries after they were put in the barrel?
Answer: From 60 to 70 kilos of liquid.

(c) Were you present when the cherries were put into each of the said 2955 barrels?
Answer: Either I or my assistant, Mr. Gasperini, was present.

(d) Did you personally see the amount of cherries that was put into each barrel?
Answer: Either I or my assistant saw the amount of cherries put in each barrel.

(e) If not, in how many barrels did you actually see them placed.
Answer: Answered by statement in 12 (c) and (d).

Thirteenth Cross-interrogatory:

(a) After the cherries were put in the barrels were the [fol. 63] barrels completely filled with "brine" or some other solution?
Answer: Yes.

(b) If you say the said barrels were not completely filled with cherries and brine state to what percent. the barrels were filled.
Answer: Completely filled.

Fourteenth Cross-interrogatory: If you state that brine was used in packing the cherries in the barrels and have not already done so give (a) the ingredients of the said brine, (b) the chemical analysis of each ingredient and the percentage of each ingredient that went to make up the said brine.

Answer: Answer under cross-interrogatory No. 10 (b), (c) and (d).

Fifteenth Cross-interrogatory:

(a) Did you make a chemical test or any other kind of a test to ascertain what the said brine contained and the percentage of its ingredients?

Answer: No.

(b) If not, from what source did you obtain the information given above?

Answer: By personally testing and smelling the brine.

Sixteenth Cross-interrogatory:

(a) Why was brine placed on the cherries?

Answer: To preserve the cherries and to satisfy the customs authorities.

(b) If brine had not been placed on the cherries in about how many days would they have commenced to decay?

Answer: I do not know.

[fol. 64] (c) If brine had not been placed on the cherries of the chemical analysis described by you above, would they have decayed after a certain period?

Answer: Yes.

(d) Would the period within which the cherries might decay depend upon whether there was or was not any brine placed on them?

Answer: Yes.

(e) Would the period within which the cherries might decay depend upon the strength or weakness of the brine placed upon them?

Answer: Yes.

(f) If you have stated that the brine consists of a saline solution of one character or another, state what would be the minimum percentage of salt or salts that it should contain in order to prevent the decaying of cherries that might remain in barrels for at least two months.

Answer: I do not know exactly the minimum percentage of salt that would be used, but I believe it was about 3 per cent., and from my long experience, by testing and smelling, I know what is strong enough. Further, I know that if the cherries are thoroughly sulphured they are preserved in ordinary water.

Seventeenth Cross-interrogatory:

(a) How were the said 2,955 barrels marked?

Answer: R. B. Cincinnati.

(b) Describe in detail just exactly how they were marked.

Answer: They were stencilled in paint "R. B. Cincinnati".

[fol. 65] (c) Attach hereto on a separate sheet of paper a reproduction of the said marks, and—

Answer: The exact reproduction of the said mark is not possible now. However, I remember that the letters R. B. were from 10 to 12 centimeters high, and that the letters of the word "Cincinnati" were from 6 to 8 centimeters high.

(d) State in full detail how it happens that you can remember at this late date the information that you have just given.

Answer: From my memory and business records.

Eighteenth Cross-interrogatory: Describe in detail the method of heading, fastening or closing the said barrels after the cherries in brine were placed in them to prevent leakage of contents.

Answer: The barrels were closed by placing on the lid and tightening and sealing it by a vegetable product known in German as "Schilf".

Nineteenth Cross-interrogatory:

(a) Did all of the said 2,955 barrels leave the place where they were packed, or the places where they were packed, at the same time?

Answer: Yes.

(b) Give the dates when and the number of barrels that left the place of packing on each date.

Answer: Exact date not known. But 792 barrels were shipped from Modena about the middle of July, 1920, and 2,193 barrels were shipped from Savona about the same date.

(c) Describe in detail what kind of conveyance was used [fol. 66] in conveying them from their place of packing.

Answer: Railroad.

Twentieth Cross-interrogatory: How many English miles is it from the place or places where the said 2,955 barrels

were packed to the place where they were loaded on board the steamship "Ansaldo San Giorgio I"?

Answer: It is about 175 English miles from Modena to Genoa and about 25 English miles from Savona to Genoa, where the barrels were loaded aboard the S/S "Ansaldo San Giorgio I."

Twenty-first Cross-interrogatory: If you have not already done so, describe in detail the kind of conveyances that were used in transporting the said 2,955 barrels from the place or places where they were packed to the port where they were loaded on board the "Ansaldo."

Answer: Railroad transportation used.

Twenty-second Cross-interrogatory:

(a) Had very much brine leaked out of the barrels after being packed and before they were delivered to the transportation company for conveyance to the loading port?

Answer: None of the barrels leaked, except a few drops from several barrels damaged during transportation.

(b) Give your best estimate as to the percentage of brine that had leaked out.

Answer: Leakage too small to give an idea.

Twenty-third Cross-interrogatory:

(a) Did you see any or part of the said 2,955 barrels at [fol. 67] the port where they were placed on board the "Ansaldo."

Answer: No.

(b) If so, state how many barrels you saw.

Answer: None.

Twenty-fourth Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

Answer: I do not remember the exact date, but it was some time in July, 1920.

(b) Give the date when they were loaded on board the "Ansaldo."

Answer: About the middle of July, 1920.

Twenty-fifth Cross-interrogatory:

(a) When you first saw them at the loading port did they appear to have lost much of their brine?

Answer: No.

(b) If so, state what percentage of their brine you think they had [redacted]

Answer: [redacted] leakage. If so, only a few drops.

Twenty-sixth Cross-Interrogatory:

(a) How long did all or any part of the said barrels remain at the loading port before being loaded onto the steamer?

Answer: Only a few days.

(b) Were they lying under cover at the loading port or were they lying in the open? Describe in detail.

Answer: The barrels were transported direct from the railroad to the lighters, on which they remained until loaded on board ship.

[fol. 68] Twenty-seventh Cross-interrogatory:

(a) Is it true that some of the barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

Answer: I did not watch the loading of these barrels on the steamer, but I know that the seller of these barrels was under obligation to have on board a cooper for the special purpose of repairing all barrels which showed any signs of leakage, regardless of quantity, before they were placed in the hold.

(b) State how many showed signs of leakage, and—

(c) Give your estimate as to the percentage of brine that had leaked out of the barrels at that time, and—

(d) Number of barrels that showed such signs of leakage.

Answer: I do not know as I was not on board the "Ansaldo San Giorgio I" when the barrels were loaded.

(e) Did you or did you not inform Rheinstrom Brothers that some of the barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: Since all leaking barrels were repaired on board ship, it was not necessary to inform the Rheinstrom Brothers Company of any leakage, inasmuch as I had orders not to ship any leaking barrels.

Twenty-eighth Cross-interrogatory:

(a) Were any of the barrels reconditioned at the loading port?

Answer: Yes.

[fol. 69] (b) Did you open any of the barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: It was unnecessary.

(c) If so, state how many barrels were so opened.

Answer: None.

(d) How many barrels showed signs of having leaked during their transportation to the loading port?

Answer: I do not know exactly but, if any, there were very few.

(e) State what was done to the barrels in reconditioning them at the loading port.

Answer: The cooper had to repair the damaged barrels and if there was a loss of water, he had to fill the barrel up again.

Twenty-ninth Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 2,955 barrels?

Answer: Three sizes: large, middle and small, mostly large.

(b) Describe each grade or kind.

Answer: The large size was from about 20 mm. and above; the middle from about 18 to 20, and the small from about 16 to 18.

Thirtieth Cross-interrogatory:

(a) How many barrels of cherries did you pack and/or inspect in June, July and August, 1920?

Answer: Several thousand.

(b) Give the name of the places where the same were packed.

[fol. 70] Answer: Besides Modena and Savona, also in Baiano, Maddaloni, Tufino.

(c) The dates of the packing.

Answer: From the end of May to the end of July, 1920.

(d) The dates of their shipment on board steamers.
Answer: Between June and July, 1920.

(e) The names of such steamers.
Answer: I do not remember the names of the steamers because all my papers are in Worms where possibly I could find them out.

Thirty-first Cross-interrogatory:

(a) Describe the marks and numbers on the various lots of barrels and/or casks that you packed during the months of June, July and August, 1920.
Answer: The marks were all "R. B. Cincinnati" except the barrels of Chisetti which were marked "U. G."

(b) Give the names of the shippers.
Answer: I think they were Bozzotti of Genoa and Fratelli Gondrand of Genoa, also Tagle at Naples.

(c) Give the names of the consignees.
Answer: The Rheinstrom Brothers Company.

Thirty-second Cross-interrogatory: What do you mean by the use of the word "tare" in the "Sixteenth interrogatory?
Answer: The weight of the empty barrel.

Thirty-third Cross-interrogatory:

(a) Did the master, agent or other representative of the [fol. 71] steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 2,955 barrels stating that the same were in apparent good external condition, or that the same were not in apparent good external condition?
Answer: No.

(b) If so, attach to your answers to these interrogatories true copies of the same.
Answer: No.

Thirty-fourth Cross-interrogatory: If in answer to any of the foregoing cross-interrogatories you state that you had anything to do with the packing of inspecting of barrels or casks of cherries during the months of June, July or August, 1920, other than those referred to in the interrogatories answered heretofore, state why it is that you remember these particular 2,955 barrels so well.

Answer: I remember the facts of the shipment of these 2,955 barrels so well because I was informed that there was a great loss. Besides that, it was the first year after the war that I again acted as purchaser and agent of the Rheinstrom Brothers Company. From my business records I may trace anything that I have done, at least, during the past 15 years.

Thirty-fifth Cross-interrogatory: Did you keep a record of the condition of the said 2,955 barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected.

Answer: A record was not necessary as I rejected all damaged barrels. Also the barrels, their contents and the brine met my usual requirements.

[fol. 72] Thirty-sixth Cross-interrogatory:

(a) Have you been testifying solely from memory as to the condition of these barrels and/or their contents, or have you been testifying as a result of having your memory refreshed from documents, data, paper or notes made either at the time the same were packed or inspected or made subsequent thereto?

Answer: As I rejected all damaged barrels it is easy to remember and, as I had no need of records, I am testifying from memory.

(b) If you have not been testifying from memory, state when such documents, data, paper and/or notes were prepared, and state—

(c) By whom such documents, data, papers and/or notes were made and attach copies of the same hereto.

Answer: I have no documents and so it is impossible to attach copies.

(d) If you have been testifying from memory solely state why it is that you remember this particular cargo so well.

Answer: For the reasons stated in answer to cross-interrogatory 34.

(e) Is it not true that you do not have any independent recollection of these 2,955 barrels but have testified concerning the same solely by reason of having your memory refreshed from certain documents, data, paper and/or notes

that were not prepared by you at the time the said barrels were being packed and/or inspected by you.

Answer: I am testifying by my memory and from my correspondence and I can state that such correspondence [fol. 73] did not exist at the time when said barrels were being packed and inspected by myself.

Thirty-seventh Cross-interrogatory: State which of the interrogatories and which of the cross-interrogatories you have answered as a result of information obtained from sources other than your own personal knowledge; that is, from what you actually saw or did.

Answer: I did not receive any other information except the fact of the loss of these barrels. All my answers are given by my own personal knowledge.

Thirty-eighth Cross-interrogatory: As to the 466 casks and/or barrels referred to in the "Twentieth" interrogatory, describe as you did in connection with your testimony concerning the 2,955 barrels—

(a) Where they were packed.

Answer: They were packed in Modena.

(b) When they were packed.

Answer: From the beginning of June until the beginning of July, 1920.

(c) How they were packed.

Answer: They were packed in good new barrels.

Thirty-ninth Cross-interrogatory:

(a) Describe the difference between the cherries packed in the said 466 casks and/or barrels and those packed in the 2,955 barrels.

Answer: There was no difference in quality.

(b) Describe in detail the difference in the method of packing the said 466 barrels and/or casks and that used [fol. 74] in packing the 2,955 barrels.

Answer: Same method of packing used.

(c) Describe in detail the difference in the method of curing the said 466 barrels and/or casks and that used in curing the 2,955 barrels.

Answer: The 466 barrels were new and therefore only paraffined, while the 2,955 barrels were cleaned before having been paraffined.

(d) Describe in detail the difference between the kind of solution of brine used in packing the 466 casks and that used in packing the 2,955 barrels.

Answer: Same kind of solution used in both cases.

(e) Describe in detail the difference in the method of preparing the said 466 casks and/or barrels to receive their contents and that method used in preparing the 2,955 barrels.

Answer: Same as 39 (c).

(f) What was in the difference in the amount of cherries placed in each of the said 466 casks and/or barrels and the amount of cherries placed in each of the said 2,955 barrels?

Answer: The contents of the 466 barrels were as follows: 21 barrels contained 230 kilos each; 230 barrels contained 182 kilos each; 15 barrels contained 148 kilos each; 200 barrels contained 35 kilos each; while the other 2,955 barrels contained 130 or 132 kilos each.

(g) What was the difference in the amount of brine placed in each of the said 466 casks and/or barrels and the amount of brine placed in each of the said 2,955 barrels?

Answer: In the lot of 466 barrels: 21 barrels contained [fol. 75] about 85 liters of brine; 230 barrels contained about 80 liters of brine; 15 barrels contained about 77 liters of brine; 200 barrels contained about 12 liters of brine.

(h) Describe the difference in the method of measuring the contents put in the said 466 casks and/or barrels and that of the said 2,955 barrels.

Answer: Method of measuring was always the same.

Fortieth Cross-interrogatory:

(a) Did you see the said 466 casks while they were in Genoa?

(b) If so, describe in detail their condition when you first saw them, giving the date when you first saw them, and

(c) Their condition when you last saw them, giving the date when you last saw them.

Answer: I do not remember, but some years ago in trying to get testimony from the Gondrand Company in Genoa, the President of said Company was willing to give it, while the Manager of the Shipping Department fearing the loss

of further business from the Ansaldo Company advised the President not to give it, saying that the giving of such information would be considered as giving out professional secrets. However, he told me that if the barrels had not been in a good condition they would not have been accepted by the Steamship Company.

Forty-first Cross-interrogatory:

(a) Did you see any or a part of said 466 casks and/or barrels at the port where they were placed on board the "Ansaldo" and

[fol. 76] (b) If so, state how many casks and/or barrels you saw.

Answer: I do not remember.

(c) At what port were the said 466 casks and/or barrels loaded on board the "Ansaldo"?

Answer: Genoa.

Forty-second Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

Answer: I do not remember.

(b) Give the date when they were loaded on board the "Ansaldo."

Answer: On or about the 15th or 20th of July, 1920.

Forty-third Cross-interrogatory:

(a) When you first saw them at the load port did they appear to have lost much of their brine?

Answer: I do not remember.

(b) If so, state what percentage of their brine you think they had lost.

Answer: This lot of 466 was handled in the same way as the 2,955 barrels, that is, if damaged they were repaired immediately.

Forty-fourth Cross-interrogatory:

(a) How long did all or any part of the said casks and/or barrels remain at the loading port before being loaded onto the steamer?

Answer: I do not think that it was more than 3 or 4 days.

(b) Were they lying under cover at the loading port or were they lying in the open; describe in detail?

[fol. 77] Answer: I am not sure but I think they were on a lighter of the shippers, Fratelli Gondrand.

Forty-fifth Cross-interrogatory:

(a) Is it true that some of the casks and/or barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

Answer: I did not watch the loading of these barrels on the steamer but I know that the seller of these barrels was under obligation to have on board a cooper for the special purpose of repairing such barrels which showed any sign of leakage, regardless of quantity, before they were placed in the hold.

(b) State how many showed signs of leakage.

Answer: Perhaps one or two were damaged through transportation.

(c) Give your estimate as to the percentage of brine that had leaked out of the casks and/or barrels at that time.

Answer: Only a few drops.

(d) Number of casks and/or barrels that showed such signs of leakage.

Answer: As stated under 45 (b).

(e) Did you or did you not inform Rheinstrom Brothers that some of the casks and/or barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: I did not inform Rheinstrom Brothers Company about any leakage because there were no barrels showing leakage. As stated before the seller and also the shipper were obligated to me personally to take care that no [fol. 78] barrels should be loaded into the hold if they were showing a leakage as little as one drop.

Forty-sixth Cross-interrogatory:

(a) Were any of the casks and/or barrels reconditioned at the loading port?

Answer: I do not believe that any barrels were reconditioned, but if so I do not think that it was more than one or two.

(b) Did you open any of the casks and/or barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: No.

(c) If so, state how many casks and/or barrels were so opened.

Answer: None.

(d) How many casks and/or barrels showed signs of having leaked during their transportation to the loading port?

Answer: None.

(e) State what was done to the casks and/or barrels in reconditioning them at the loading port.

Answer: The damaged barrels were repaired and any loss of brine was replaced by sea water.

Forty-seventh Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 466 casks and/or barrels?.

Answer: They were mostly large cherries.

(b) Describe each grade or kind.

Answer: The cherries in question were quality "Duroni."

Forty-eighth Cross-interrogatory:

(a) Did the master, agent or other representative of the [fol. 79] steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 466 casks and/or barrels stating that the same were in apparent good external condition, or that the same were not in apparent good external condition?

Answer: Nothing is known to me about such a receipt.

(b) If so, attach to your answers to these interrogatories true copies of the same.

Answer: I have none.

Forty-ninth Cross-interrogatory:

(a) Did you keep a record of the condition of the said 466 casks and/or barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected?

Answer: I kept no record, because they were packed and inspected in the same way as the other cherries, that is, sound good quality, in good barrels, and the usual brine.

(b) Attach copies of the same hereto and appropriately mark them for identification.

Answer: I have none.

Fiftieth Cross-interrogatory: As to the 845 barrels referred to in the "Thirty-eighth" interrogatory, describe as you did in connection with your testimony concerning the 2,955 barrels.

(a) Where they were packed.

Answer: They were packed partly in Maddaloni Inferiore at the factory of Luigi Ceretto, and partly in the property of Ant. (?) Napoletano in Baiano.

(b) When they were packed.

Answer: Between the end of May until the end of June, 1920.

[fol. 80] (c) How they were packed.

Answer: In the same manner as was stated before.

Fifty-first Cross-interrogatory:

(a) Describe the difference between the cherries in the 845 barrels and those packed in the 2,955 barrels.

Answer: No difference.

(b) Describe in detail the difference in the method of packing the said 845 barrels and that used in packing the 2,955 barrels.

Answer: No difference.

(c) Describe in detail the difference in the method of curing the said 845 barrels and that used in curing the 2,955 barrels.

Answer: No difference.

(d) Describe in detail the difference between the kind of solution of brine used in packing the 845 barrels and that used in packing the 2,955 barrels.

Answer: No difference.

(e) Describe in detail the difference in the method of preparing the said 845 barrels to receive their contents and that method used in preparing the 2,955 barrels.

Answer: No difference.

(f) What was the difference in the amount of cherries placed in each of the said 845 barrels and the amount of cherries placed in each of the said 2,955 barrels.

Answer: No difference.

(g) What was the difference in the amount of brine placed in each of the said 845 barrels and the amount of [fol. 81] brine placed in each of the said 2,955 barrels.

Answer: No difference.

(h) Describe the difference in the method of measuring the contents put in the said 845 barrels and that of the said 2,955 barrels.

Answer: No difference.

Fifty-second Cross-interrogatory:

(a) Did you see the said 845 barrels while they were in Genoa?

(b) If so, describe in detail their condition when you first saw them, giving the date when you first saw them, and

(c) Their condition when you last saw them, giving the date when you last saw them.

Answer: The 845 barrels were not loaded in Genoa, but they were loaded in Naples. I do not remember if I saw this lot, so that I cannot state the dates when I first or last saw them at the port, or their condition at that time.

Fifty-third Cross-interrogatory:

(a) Did you see any or a part of the said 845 barrels at the port where they were placed on board the "Ansaldo" and

(b) If so, state how many barrels you saw.

Answer: I do not remember.

(c) At what port were the said 845 barrels loaded on board the "Ansaldo"?

Answer: They were loaded in Naples.

Fifty-fourth Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

[fol. 82] (b) Give the date when they were loaded on board the "Ansaldo."

Answer: I do not remember.

Fifty-fifth Cross-interrogatory:

(a) When you first saw them at the loading port did they appear to have lost much of their brine?

Answer: No.

(b) If so, state what percentage of their brine you think they had lost.

Answer: The percentage is so small that it cannot be expressed, because of their short trip to the port the loss could have been of a few drops only.

Fifty-sixth Cross-interrogatory:

(a) How long did all or any part of the said 845 barrels remain at the loading port before being loaded onto the steamer?

Answer: Only a few days, because we had taken care that the barrels arrived when the steamer was in the port.

(b) Were they lying under cover at the loaded port or were they lying in the open; describe in detail?

Answer: They were loaded on the lighter from the railroad cars, and it is possible that lighters were covered, but if not covered the barrels were moistened in the morning and evening.

Fifty-seventh Cross-interrogatory:

(a) Is it true that some of the barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

(b) State how many showed signs of leakage, and

[fol. 83] (c) Give your estimate as to the percentage of brine that had leaked out of the barrels at that time, and

(d) Number of barrels that showed such signs of leakage.

(e) Did you or did you not inform Rheinstrom Brothers that some of the barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: I do not believe that any barrels showed leakage when loaded on board the "Ansaldo," but if so, there were

no more than one or two, and they were repaired by the cooper on board ship before being placed in the hold, so it was not necessary to inform the Rheinstrom Brothers Company since no leaking barrels were loaded in the hold.

Fifty-eighth Cross-interrogatory:

(a) Were any of the barrels reconditioned at the loading port?

Answer: Answered in reply to cross-interrogatory No. 57.

(b) Did you open any of the barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: No.

(c) If so, state how many barrels were so opened?

Answer: None.

(d) How many barrels showed signs of having leaked during their transportation to the loading port?

Answer: Only one or two.

(e) State what was done to the barrels in reconditioning them at the loading port.

[fol. 84] Answer: Answered in reply to cross-interrogatory No. 57.

Fifty-ninth Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 845 barrels?

Answer: There were three sizes: large, middle and small.

(b) Describe each grade or kind.

Answer: The large cherries were from 20 mm. and above; middle size from about 18 to 20; and small cherries from about 16 to 18 mm.

Sixtieth Cross-interrogatory:

(a) Did the master, agent or other representative of the steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 845 barrels stating that the same were in apparent good external condition?

Answer: Not to my knowledge.

(b) If so, attach to your answers to these interrogatories true copies of the same.

Answer: I have none.

Sixty-first Cross-interrogatory:

(a) Did you keep a record of the condition of the said 845 barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected?

Answer: I did not keep any records as it was unnecessary. I kept no record, because they were packed and inspected in the same way as the other cherries, that is, to meet our requirement of sound good quality and barrels in good condition.

(b) Attach copies of the same here to and appropriately mark them for identification.

Answer: I have none.

[fol. 85] Sixty-second Cross-interrogatory:

(a) With whom have you discussed the matters about which you have been testifying prior to the giving of your testimony?

Answer: I met my assistant, Mr. Gasperini, in Rome, as he came for the purpose of giving his testimony with me, but I state that my meeting with Mr. Gasperini had no influence and should have none, on his testifying.

(b) When did you discuss this matter last with Mr. Umberto Gasperini?

Answer: Answered under cross-interrogatory 62 (a).

Sixty-third Cross-interrogatory: Give the names of all persons who have been present in the room during the taking of all or a part of your testimony.

Answer: William Oscar Jones, Consul of the United States of America at Rome, Italy, and Vinzo de Massellis a clerk in the American Consulate General at Rome, Italy.

Sixty-fourth Cross-interrogatory:

(a) Have you ever seen or had read to you these cross-interrogatories or a translatio nthereof prior to giving your testimony?

Answer: No.

(b) If so, state when and where you saw them and/or had them read to you, and

(c) By whom they were shown or read to you.

(d) Had you been informed by anyone as to the nature of these cross-interrogatories?

Answer: Answered by cross-interrogatory 64 (a).

[fol. 86] Sixty-fifth Cross-interrogatory:

(a) Have you ever seen or had read to you the interrogatories or a translation thereof prior to giving your testimony?

Answer: Yes. I received a copy of the interrogatories from the lawyers of the Rheinstrom Brothers Company.

(b) If so, state when and where you saw them and/or had them read to you, and

(c) By whom they were shown or read to you.

(d) Had you been informed by anyone as to the nature of these interrogatories?

Answer: I received the copy of the interrogatories between the 15th and 20th of March, 1929, at my house in Worms, Germany, and I read them myself and was fully informed of the contents from the copy of the interrogatories which I received.

Interrogatories Propounded to Umberto Gasperini, a Witness on Behalf of the Libellant, and Answers Thereto

First Interrogatory: What is your name, age and present occupation?

Answer: My name is Umberto Gasperini. Age 44 years, and my present occupation is European representative of the Liberty Cherry and Fruit Company, of Covington, Kentucky.

Second Interrogatory: What was your occupation in May, June and July, 1920, and for how long had you been so employed?

Answer: During the months of May, June and July, 1920, I was employed by the Rheinstrom Brothers Com-
[fol. 87] pany, of Cincinnati, Ohio, as an assistant to Mr. August Kiefer. I had the same employment with this company from May 15th to October 15th of every year during the years 1919, 1920, 1922 and 1923.

Third Interrogatory: If you state that you were employed by The Rheinstrom Brothers Company, state in detail the nature of such employment.

Answer: My duties consisted of assisting Mr. August Kiefer, who is the European representative and purchasing agent for the Rheinstrom Brothers Company, in everything that was connected with this work.

Fourth Interrogatory: Did you have any connection with a lot of 2,955 barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Societa Esportazione Agricola Ligure, and shipped at Naples on the steamship "Ansaldo San Giorgio I," in July, 1920, consigned to the First National Bank of Cincinnati at Philadelphia?

Answer: Yes, but I want to call your attention to the fact that those barrels were not shipped from Naples but from Genoa.

Fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

Answer: I assisted in, or inspected and supervised the packing of the fruit and the shipment of the casks. In detail, my duties consisted of:

(a) watching the proper sulphuring of the fruit;

(b) the proper sorting of the fruit, so that only clear, sound, and whole cherries were selected and given to us; [fol. 88] (c) checking the weighing of the cherries when they were placed in the containers;

(d) watching the proper closing, filling up with the solution of sulphur water, and the sealing of every barrel;

(e) the loading of the barrels on the railroad cars;

(f) unloading from cars and reloading on lighters of the barrels at the port of shipment, so that no leaking or damaged barrels could leave the shipping point. Mr. Kiefer and I performed these duties either together or separately. In other words, one of us, or the two together, were always present.

Sixth Interrogatory: State, if you know: (a) where said cherries were prepared for shipment; (b) when said cherries were prepared for shipment.

Answer: (a) Said cherries were prepared for shipment at the following places: some in Savona, in the premises

located by the sea, formerly occupied by Societa Chinotti, some also in Savona at the plant of Societa Esportazione Agricola Ligure. Some in Modena at the plant of Carlo Venturelli & Co. A small number of said barrels were packed in Verona and Voghera, and these barrels were first shipped to the aforesaid premises of Societa Chinotti where all the lids were removed for the inspection of the fruit and the checking up of the weight.

(b) All these cherries were of the 1920 crop and were prepared for shipment from the latter part of May up to the end of June.

[fol. 89] Seventh Interrogatory: Were you present when said cherries were prepared for shipment?

Answer: Yes.

Eighth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the process or processes through which the cherries were put in preparing them for shipment, enumerating, in order, the various steps taken until they were placed in containers for delivery to the railroad.

Answer: The cherries were first fumigated with sulphur, then spread on tables and carefully sorted so that all of the broken, dark, or otherwise damaged cherries were put aside. Then the good fruit was put into containers and weighed, after which the lid was put on and the barrel was filled up with a solution of sulphured water. The barrels so filled were marked "A. K." so that it would be easy to identify them at any time and place.

Ninth Interrogatory: Did you supervise or assist in supervising their preparation for shipment?

Answer: Yes. At times I supervised and at other times I assisted Mr. Kiefer.

Tenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your supervision.

Answer: In reply to this question I refer to my answer to the fifth interrogatory.

Eleventh Interrogatory: Did you inspect or assist in inspecting said cherries?

Answer: Yes.

[fol. 90] Twelfth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.

Answer: I have answered this question in detail in answer to interrogatory number 5.

Thirteenth Interrogatory: Did you act under anyone or cooperate with anyone in said work of supervision and inspection?

Answer: Yes:

Fourteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state:

(a) The name of said party.

Answer: Mr. August Kiefer.

(b) The part taken by said party in said supervision and inspection.

Answer: We were doing the same kind of work and, as I stated before, we performed this work either together or separately but more frequently separately, because quite often we had packing of fruit going on at the same time in different places.

Fifteenth Interrogatory: State if you knew whether said cherries were weighed.

Answer: Yes, I know that they were weighed.

Sixteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first weighed and then the containers and their contents weighed together and the tare subtracted.

[fol. 91] Answer: The empty containers were put on the scales and weighed, then the cherries were placed into them in such quantity as to have the scale register the right gross weight, that is to say, the net weight of fruit plus the weight of the container. Sellers, as a rule, always allow abundant weight of fruit and Mr. Kiefer and I saw to it that we were getting what was coming to us.

Seventeenth Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?

Answer: Yes, as I just stated in answer to your previous question.

Eighteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: 792 barrels each contained 130 kilos of net fruit, and 2,163 barrels each contained 132 kilos of net fruit.

Nineteenth Interrogatory:

(a) State, if you know, whether the amount of cherries described in your answer to the last preceding interrogatory was placed in containers and made ready for shipment on cars.

Answer: Yes, I know that the correct amount of cherries were placed in the containers made ready for shipment.

(b) If your answer to (a) is in the affirmative, describe the condition of said containers.

Answer: The containers were all in good condition, otherwise they would not have been accepted. If there was a [fol. 92] barrel leaking or not in sound condition, we had it repaired or changed.

(c) Were said containers making up said shipment of 2,955 barrels of different capacities?

Answer: They were all of about the same capacity.

Twentieth Interrogatory: If your answer to the Nineteenth Interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: All of the 2,955 barrels were of about the same capacity. In 2,163 barrels we put 130 kilos of net fruit. The two kilos difference was due to the fact that the 792 barrels contained Modena cherries, a variety which, being larger and harder, required more room. I may state that the quality of all the cherries was good.

Twenty-first Interrogatory: Did you have any connection with a lot of 466 casks and/or barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Chisetti Antonio & Cia., and shipped at Genoa on the steamship "Ansaldo San Giorgio I" in July, 1920, consigned to order at Philadelphia?

Answer: I know of this deal, which was made by Mr. Kiefer with Messrs. Chisetti Antonio & Cia., of Modena, but Mr. Kiefer himself personally inspected and supervised

the packing, weighing, and so forth. The only thing I had to do with this shipment was that I looked over the barrels in Genoa at the time they were unloaded from the railroad cars and loaded on the lighters, and I found that they were all in sound condition.

[fol. 93] Twenty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

Answer: I answered this question fully in reply to your previous question.

Twenty-third Interrogatory: State, if you know: (a) where said cherries were prepared for shipment; (b) when said cherries were prepared for shipment.

Answer: The only thing I know is that they were prepared for shipment in Modena at the plant of Chisetti Antonio & Cia., but I do not know that exact date.

Twenty-fourth Interrogatory: Were you present when said cherries were prepared for shipment?

Answer: No.

Twenty-fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the process or processes through which the cherries were put in preparing them for shipment, enumerating, in order, the various steps taken until they were placed in containers for delivery to the railroad.

Answer: My previous answer was in the negative so I have no reply to this question.

Twenty-sixth Interrogatory: Did you supervise or assist in supervising their preparation for shipment?

Answer: No.

Twenty-seventh Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe [fol. 94] in as much detail as possible, the nature of your supervision.

Answer: I can make no reply to this question.

Twenty-eighth Interrogatory: Did you inspect or assist in inspecting said cherries?

Answer: No.

Twenty-ninth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.

Answer: I had no connection with the inspection of these cherries.

Thirtieth Interrogatory: Did you act under anyone or cooperate with anyone in said work of supervision and inspection?

Answer: No.

Thirty-first Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state: (a) the name of said party; (b) the part taken by said party in said supervision and inspection.

Answer: I had nothing to do with this supervision and inspection.

Thirty-second Interrogatory: State if you know whether said cherries were weighed.

Answer: I do not know.

Thirty-third Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first weighed and then the containers and their contents weighed [fol. 95] together and the tare subtracted.

Answer: As I said before, I had nothing to do with the supervision and inspection of this lot.

Thirty-fourth Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?

Answer: I did not.

Thirty-fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: I have nothing to say.

Thirty-sixth Interrogatory: State, if you know, whether the amount of cherries described in your answers to the last preceding interrogatory was placed in containers and made ready for shipment on cars; (b) if your answer to (a) is in the affirmative, describe the condition of said con-

tainers; (c) were said containers making up said shipment of 466 casks and/or barrels of different capacities?

Answer: I had no connection with the weighing of this lot of cherries.

Thirty-seventh Interrogatory: If your answer to the thirty-sixth interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: My reply to the preceding question is sufficient answer.

[fol. 96] Thirty-eighth Interrogatory: Did you have any connection with the lot of 845 barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Societa Esportazione Agricola Ligure and shipped at Naples on the steamship "Ansaldo San Giorgio I" in July 1920, consigned to order at New York?

Answer: Yes.

Thirty-ninth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

Answer: I performed for this lot of 845 barrels the same duties as those mentioned in my answer to the fifth interrogatory.

Fortieth Interrogatory: State, if you know, (a) where said cherries were prepared for shipment.

Answer: Some of these cherries were prepared for shipment in the premises of Mr. Luigi Ceretto in Maddaloni Inferiore, and some in the premises of a certain Mr. Napoletano in Baiano. Both of these two places are located near Naples.

(b) When said cherries were prepared for shipment?

Answer: Said cherries were prepared for shipment in the latter part of May and the first half of June, 1920.

Forty-first Interrogatory: Were you present when said cherries were prepared for shipment?

Answer: Yes. Mr. Kiefer or I were present.

Forty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the

[fol. 97] process or processes through which the cherries were put in preparing them for shipment, enumerating, in order the various steps taken until they were placed in containers for delivery to the railroad.

Answer: We followed exactly the same procedure as outlined in my answer to your question number 8.

Forty-third Interrogatory: Did you supervise or assist in supervising their preparation for shipment?

Answer: Yes. Either Mr. Kiefer or I supervised the preparation of said cherries for shipment.

Forty-fourth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your supervision.

Answer: My duties in supervising were the same as stated by me in my answer to your fifth question.

Forty-fifth Interrogatory: Did you inspect or assist in inspecting said cherries?

Answer: Yes.

Forty-sixth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.

Answer: I did the same duties as stated in answer to your fifth question.

Forty-seventh Interrogatory: Did you act under anyone or cooperate with anyone in said work of supervision and inspection?

Answer: Yes.

[fol. 98] Forty-eighth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state:

(a) The name of said party.

Answer: Mr. August Kiefer.

(b) The part taken by said party in said supervision and inspection.

Answer: When he was present I assisted him in supervising and inspection. In other words, he was in charge of all such activities.

Forty-ninth Interrogatory: State if you know whether said cherries were weighed.

Answer: Yes, they were weighed.

Fiftieth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first weighed and then the containers and their contents weighed together and the tare subtracted.

Answer: They were weighed in the same manner stated in my answer to your sixteenth question.

Fifty-first Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?

Answer: Yes, I checked the weight of said cherries and containers as they were weighed.

Fifty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: Each of the 845 barrels had 132 kilos net fruit.

[fol. 99] Fifty-third Interrogatory:

(a) State, if you know, whether the amount of cherries described in your answer to the last preceding interrogatory was placed in containers and made ready for shipment on cars.

Answer: I do know that not less than 132 kilos net fruit were put in each one of the 845 barrels made ready for shipment.

(b) If your answer to "(a)" is in the affirmative, describe the condition of said containers.

Answer: All the containers were in sound and good condition.

(c) Were said containers making up said shipment of 845 barrels of different capacities?

Answer: All of these barrels were of about the same capacity.

Fifty-fourth Interrogatory: If your answer to the Fifty-third Interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: As I stated in my answer to the question just preceding, these 845 barrels were of about the same ca-

pacity, and the cherries placed in them were of prime quality, clear and sound.

Cross-interrogatories Propounded to Umberto Gasperini, and Answers Thereto

First Cross-interrogatory: If in answer to the "Fourth" interrogatory you say you recall "2,955 barrels of cherries in brine * * * shipped at Naples on the steamship 'Ansaldo San Giorgio I' in July, 1920," state if you saw [fol. 100] the said cargo at Naples prior to being loaded on the aforementioned steamer.

Answer: I should first like to state that the 2,955 barrels in question were not shipped from Naples but from Genoa. I saw all or at least a part of this shipment prior to being loaded on the "Ansaldo San Giorgio I."

Second Cross-Interrogatory: State:

(a) If you saw the said steamer in the port of Naples.

Answer: I saw the said steamer laying in the port of Genoa.

(b) If you saw her being loaded with the barrels in question, state

(c) Whether the said vessel was then lying at a pier or at anchor.

Answer: I did not see this steamer being loaded with the barrels in question, but I saw the vessel when it was laying at anchor.

(d) If the said vessel loaded the said barrels directly from a pier or from lighters.

Answer: I know that the barrels were loaded from lighters, although I did not see it done.

(e) In what position the said steamer was lying.

Answer: At anchor.

Third Cross-interrogatory:

(a) Did you act as Rheinstrom's agent or representative in negotiating with the shipper for the buying of the said 2,955 barrels?

Answer: No.

(b) What did you have to do with the buying or purchasing of the said barrels?

Answer: Nothing.

[fol. 101] Fourth Cross-interrogatory:

(a) Did you act as agent or representative for Rheinstrom Brothers in connection with the packing or inspecting of the said 2,955 barrels?

Answer: Yes, I acted as assistant to Mr. August Kiefer.

(b) Who were you employed by in June, July and August, 1920?

Answer: By the Rheinstrom Brothers Company.

(c) Were you employed by the shipper of the said 2,955 barrels or were you employed by Rheinstrom Brothers or were you employed by someone else, and, if so, state who?

Answer: I was employed by Rheinstrom Brothers Company directly.

Fifth Cross-interrogatory:

(a) Did you see any or a part of the 2,955 barrels while they were still empty, that is, before the cherries in brine were put into them?

Answer: Yes.

(b) If so, describe in full detail their condition.

Answer: These barrels were in good condition.

(c) Had they ever been used before as containers of any other liquids?

Answer: To my knowledge they were previously used as containers for mineral oil.

(d) Prior to having the cherries in brine placed in them had they been cleaned, and, if so, describe in the fullest detail how they had been cleaned.

Answer: Yes, they were cleaned. They were first burned inside and then slightly scraped in order to remove the carbon after which they were paraffined.

[fol. 102] (e) If you state that they had been cleaned state what, if anything, was done to them before the cherries were put into them.

Answer: As I just stated in answer to your previous question.

(f) Describe in detail how they were prepared to receive the cherries.

Answer: The same answer applies that I gave to question number 5 (d).

(g) State in full the reasons why they were prepared as you have described them.

Answer: In order to remove the oil that may have been left in the barrel.

(h) Give the date when you first saw these barrels and describe their condition at that time.

Answer: I first saw these barrels during the time when they were packed, that is to say, during the month of June, 1920.

(i) Give the date when the packing commenced and describe in detail the condition of the barrels at that time.

Answer: Packing commenced about the beginning of June, 1920, and lasted all of that month and, to the best of my knowledge, the barrels were in good condition at that time.

Sixth Cross-interrogatory:

(a) Give the date when the packing of the said 2,955 barrels was commenced.

Answer: About the end of May or during the first few days of June, 1920.

(b) Give the date when the packing of the said 2,955 barrels was finished.

Answer: About the end of June, 1920.

[fol. 103] (c) Give the date when the heads of said barrels were finally put in or they were finally closed and ready for shipment.

Answer: The heads were put on the same day they were packed.

(d) Describe in full detail how they were closed and made ready for delivery to the carrier.

Answer: After the heads had been put on the barrels were filled up with sulphur water and then they were closed.

Seventh Cross-interrogatory:

(a) In what locality, giving the name of the city, town or district, were the barrels in question packed?

Answer: Some of them were packed in Savona, some of them in Modena, and some others in Verona and Voghera.

(b) Were the said barrels packed in a building, such as a factory, shed, or the like, and, if so, describe such place in full detail?

Answer: Some of them were packed in the premises formerly occupied by Societa Chinotti at Savona, which consisted of a large covered building and covered sheds in the court yard. Others were packed at Verona and Voghera, but all of the barrels packed in these two cities were brought to the premises of Societa Chinotti at Savona where they were opened for inspection. Others were also packed in Savona at the plant of Societa Agricola Esportazione Ligure, which plant consisted of a number of large covered sheds. Others were also packed in Modena at the plant of Carlo Venturelli & Cia., which had a covered building and a large court yard with a temporary covering.

[fol. 104] Eighth Cross-interrogatory:

(a) State when you first saw the cherries prior to their being packed in the barrels in question.

Answer: I first saw the cherries when they came out of the fumigation room just prior to their being packed.

(b) Were they green, that is, fresh from the trees, or—

Answer: They were fresh from the trees, but they had already turned yellow from the action of the sulphur.

(c) Were they dried or otherwise prepared for packing?

Answer: The fresh fruit was only fumigated with sulphur.

(d) Was anything done to the said cherries prior to being packed?

Answer: Yes.

(e) If so, describe in detail just what was done to them before they were placed in the barrels.

Answer: They were first spread on tables and sorted by size and the dark and rotten fruit was taken away. This work was done after the cherries came out of the fumigation room and then they were placed in the barrels, which was all done during the same day.

Ninth Cross-interrogatory: Were the said cherries subjected to (a) heat, or—

Answer: These cherries were not subjected to heat.

(b) Chemicals of any kind, prior to being placed in the barrels.

Answer: The only chemical process was their fumigation with sulphur.

[fol. 105] Tenth Cross-interrogatory:

(a) After the cherries were put in the barrels was any solution of any kind placed over them, and, if so—
Answer: Yes.

(b) State of what it was composed, that is—
Answer: Sulphured water, which was sometimes strengthened with either sulphurous anhydride or bysulphite of sodium.

(c) Give the chemical analysis of such solution, and—
Answer: The solution consisted of solely sulphured water which, as I just stated, was sometimes strengthened with sulphurous anhydride or bysulphite of sodium.

(d) Describe how this solution was put over the cherries.
Answer: This solution mixed with water was put over the cherries through the bung hole.

Eleventh Cross-interrogatory:

(a) Was the same quantity of cherries put in each of the said 2,955 barrels and if not—
Answer: About the same quantity of cherries was put into each barrel.

(b) State what quantity was put in each barrel.
Answer: 792 barrels each contained 130 kilos of net fruit and 2,163 each contained 132 kilos of net fruit.

(c) What kind of measure, scales or other implement was used to measure or weigh out the quantity of cherries that was placed in each barrel, and—
Answer: A centesimal scale.

[fol. 106] (d) Describe the same in detail.
Answer: It was the usual type of centesimal scale.

Twelfth Cross-interrogatory:

(a) How many pounds or kilograms of cherries were placed in each barrel?
Answer: The same as stated in reply to your question number 11 (a).

(b) How many pounds or kilograms of liquid was placed over the cherries after they were put in the barrel?

Answer: I am not positive, but I think it was from about 65 to 70 kilos of liquid.

(c) Were you present when the cherries were put into each of the said 2,955 barrels?

Answer: Either Mr. Kiefer or I, individually or together, were present when the cherries were put into the said barrels.

(d) Did you personally see the amount of cherries that was put into each barrel?

Answer: Either Mr. Kiefer or I saw them filled.

(e) If not, in how many barrels did you actually see them placed?

Answer: I do not know how many barrels I personally saw filled with cherries.

Thirteenth Cross-interrogatory:

(a) After the cherries were put in the barrels were the barrels completely filled with "brine" or some other solution?

Answer: After the cherries were put into the barrels, the barrels were filled almost to the top with solution and then [fol. 107] about four kilos of salt in grain were put into each barrel.

(b) If you say that the said barrels were not completely filled with cherries and brine state to what percent. the barrels were filled.

Answer: They were completely filled.

Fourteenth Cross-interrogatory: If you state that brine was used in packing the cherries in the barrels and have not already done so give (a) the ingredients of the said brine; (b) the chemical analysis of each ingredient and the percentage of each ingredient that went to make up the said brine.

Answer: I have explained the brine to the best of my ability in answer to your question number 10.

Fifteenth Cross-interrogatory:

(a) Did you make a chemical test or any other kind of a test to ascertain what the said brine contained and the percentage of its ingredients?

Answer: I made no chemical test. I tested the brine either by smelling or tasting it.

(b) If not, from what source did you obtain the information given above.

Answer: While I made tests only by smelling or tasting the brine, I may state that the sellers of the cherries occasionally had chemists make the chemical tests.

Sixteenth Cross-interrogatory:

(a) Why was brine placed on the cherries?

Answer: In order to preserve them.

[fol. 108] (b) If brine had not been placed on the cherries in about how many days would they have commenced to decay?

Answer: That would depend on the climate and the exposure of the barrels to the heat of the sun.

(c) If brine had not been placed on the cherries of the chemical analysis described by you above, would they have decayed after a certain period?

Answer: Sure.

(d) Would the period within which the cherries might decay depend upon whether there was or was not any brine placed on them?

Answer: Although the fumigation would preserve the cherries for a certain length of time, if no brine had been used the cherries would decay much sooner.

(e) Would the period within which the cherries might decay depend upon the strength or weakness of the brine placed upon them?

Answer: Yes, I would say to a certain degree.

(f) If you have stated that the brine consists of a saline solution of one character or another, state what would be the minimum percentage of salt or salts that it should contain in order to prevent the decaying of cherries that might remain in barrels for at least two months.

Answer: I think that the minimum percentage of salt would be about 3 per cent, but I am not positive about this.

Seventeenth Cross-interrogatory:

(a) How were the said 2,955 barrels marked?

[fol. 109] Answer: On one head there was the trade mark

of the shipper, and on the other the initials "R. B. Cincinnati".

(b) Describe in detail just exactly how they were marked.

Answer: As I just stated in answer to your preceding question. However, I might add that the initials "A. K." were marked on the bung stave of every barrel for identification.

(c) Attach hereto on a separate sheet of paper a reproduction of the said marks.

Answer: While I do not remember the seller's trade mark well enough to give a reproduction of it, I do remember that the buyer's mark was "R. B. Cincinnati", which was put on one head of the barrel in black paint with the use of a stencil.

(d) State in full detail how it happens that you can remember at this late date the information that you have just given.

Answer: I may state that I remember all things in particular because as soon as this shipment arrived in the United States the damage was ascertained by the Rheinstrom Brothers and I was informed about it when I went back to Cincinnati in October, 1920.

Eighteenth Cross-interrogatory: Describe in detail the method of heading, fastening or closing the said barrels after the cherries in brine were placed in them to prevent leakage of contents.

Answer: The cooper put on the heads and then tightened them by pushing down the hoops with a hammer. If he saw that there was a crack or light showing between the [fol. 110] staves, which might cause a leakage, he would seal it with club-rush and some times also with cotton. Then he would see if there was any leakage.

Nineteenth Cross-interrogatory:

(a) Did all of the said 2,955 barrels leave the place where they were packed, or the places where they were packed, at the same time?

Answer: All of the said 2,955 barrels left the places where they were packed at about the same time, or during a period of two or three days.

(b) Give the dates when and the number of barrels that left the place of packing on each date.

Answer: I do not remember the dates or the number of barrels that left the packing places on each date.

(c) Describe in detail what kind of conveyance was used in conveying them from their place of packing.

Answer: From the factory to the depot they were conveyed either with automobile trucks or wagons, and from there to Genoa by railroad.

Twentieth Cross-interrogatory: How many English miles is it from the place or places where the said 2,955 barrels were packed to the place where they were loaded on board the steamship "Ansaldo San Giorgio I"?

Answer: It is about 175 English miles from Modena to Genoa and about 25 English miles from Savona to Genoa.

Twenty-first Cross-interrogatory: If you have not already done so, describe in detail the kind of conveyances that were used in transporting the said 2,955 barrels from [fol. 111] the place or places where they were packed to the port where they were loaded on board the "Ansaldo".

Answer: As I stated in reply to your question number 19.

Twenty-second Cross-interrogatory:

(a) Had very much brine leaked out of the barrels after being packed and before they were delivered to the transportation company for conveyance to the loading port?

Answer: No, because they were kept open for refilling up to the time they were delivered to the railroad.

(b) Give your best estimate as to the percentage of brine that had leaked out.

Answer: None.

Twenty-third Cross-interrogatory:

(a) Did you see any or a part of the said 2,955 barrels at the port where they were placed on board the "Ansaldo"?

Answer: I saw them at the port as they were being loaded on lighters.

(b) If so, state how many barrels you saw.

Answer: I cannot state the exact number, but virtually I saw practically all of them.

Twenty-fourth Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

Answer: I do not remember the exact date, but it was about the 15th of July, 1920.

(b) Give the date when they were loaded on board the "Ansaldo".

Answer: I do not know.

[fol. 112] Twenty-fifth Cross-interrogatory:

(a) When you first saw them at the loading port did they appear to have lost much of their brine?

Answer: No.

(b) If so, state what percentage of their brine you think they had lost?

Answer: If any brine was lost, the amount was too small to quote in percentage. The cooper was always present and when he saw a barrel that showed leakage he fixed it immediately.

Twenty-sixth Cross-interrogatory:

(a) How long did all or any part of the said barrels remain at the loading port before being loaded onto the steamer?

Answer: I do not know exactly, but I think that they did not stay there any longer than a day or two.

(b) Were they lying under cover at the loading port or were they lying in the open; describe in detail?

Answer: I do not remember.

Twenty-seventh Cross-interrogatory:

(a) Is it true that some of the barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

Answer: I do not know because I did not see them as they were being loaded on board the steamship "Ansaldo".

(b) State how many showed signs of leakage.

Answer: I do not know.

(c) Give your estimate as to the percentage of brine that had leaked out of the barrels at that time.

Answer: I do not know.

[fol. 113] (d) Number of barrels showed such signs of leakage.

Answer: I do not know.

(e) Did you or did you not inform Rheinstrom Brothers that some of the barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: I did not know anything about leakage and therefore could not inform Rheinstrom Brothers.

Twenty-eighth Cross-interrogatory:

(a) Were any of the barrels reconditioned at the loading port?

Answer: Yes, a few of them.

(b) Did you open any of the barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: No, I did not.

(c) If so, state how many barrels were so opened.

Answer: None by me.

(d) How many barrels showed signs of having leaked during their transportation to the loading port?

Answer: I do not remember exactly the number, but I may state that there were very few, not over twenty barrels.

(e) State what was done to the barrels in reconditioning them at the loading port.

Answer: They were repaired with club-rush and cotton to stop any of the leaks.

Twenty-ninth Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 2,955 barrels?

[fol. 114] Answer: To the best of my recollection, all of the cherries in the 2,955 barrels were first grade fruit.

(b) Describe each grade or kind.

Answer: My preceding reply answers this question.

Thirtieth Cross-interrogatory:

(a) How many barrels of cherries did you pack and/or inspect in June, July and August, 1920?

Answer: I inspected from about 4,500 to 5,000 barrels of cherries during the period mentioned.

(b) Give the names of the places where the same were packed.

Answer: Naples, Modena, Savona, Maddaloni, Baiano.

(c) The dates of the packing.

Answer: From May 20th up to first part of August, 1920.

(d) The dates of their shipment on board steamers.

Answer: I do not remember the shipping dates.

(e) The names of such steamers.

Answer: I do not remember the names of the steamers, because Mr. Kiefer personally attended to the shipping of the cherries.

Thirty-first Cross-interrogatory:

(a) Describe the marks and numbers on the various lots of barrels and or casks that you packed during the months of June, July and August, 1920.

Answer: As far as I can remember, one end of the barrels bore the mark "R. B. Cincinnati", and the other end bore the seller's trade mark.

[fol. 115] (b) Give the names of the shippers.

Answer: Societa Agricola Esportazione Ligure, Ghisetti Antonio & Cia., and Saverio Bellofatto, are the only ones I can remember.

(c) Give the names of the consignees.

Answer: The consignee was Rheinstrom Brothers Company.

Thirty-second Cross-interrogatory: What do you mean by the use of the word "tare" in the "Sixteenth" interrogatory?

Answer: I understand "tare" to mean the weight of the empty barrel.

Thirty-third Cross-interrogatory:

(a) Did the master, agent or other representative of the steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 2,955 barrels stating that the same were in apparent good external condition, or that the same were not in apparent good external condition?

Answer: I do not know.

(b) If so, attach to your answers to these interrogatories true copies of the same.

Answer: I have none.

Thirty-fourth Cross-interrogatory: If in answer to any of the foregoing cross-interrogatories you state that you had anything to do with the packing or inspecting of barrels or casks of cherries during the months of June, July or August, 1920, other than those referred to in the interrogatories answered heretofore, state why it is that you remember these particular 2,955 barrels so well.

Answer: As I stated before, because when I got back to Cincinnati in October, 1920, the Rheinstrom Brothers in- [fol. 116] formed me that the shipment had arrived in damaged condition.

Thirty-fifth Cross-interrogatory: Did you keep a record of the condition of the said 2,955 barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected.

Answer: I did not keep any record.

Thirty-sixth Cross-interrogatory:

(a) Have you been testifying solely from memory as to the condition of these barrels and/or their contents, or have you been testifying as a result of having your memory refreshed from documents, data, paper or notes made either at the time the same were packed or inspected or made subsequent thereto?

Answer: I have been testifying solely from memory from what I was told about this damaged shipment when I got back to America in October, 1920, and also from my personal connection in Italy with this shipment.

(b) If you have not been testifying from memory, state when such documents, data, paper and/or notes were prepared, and state——

Answer: I was furnished no documents.

(c) By whom such documents, data papers and/or notes were made and attach copies of the same hereto.

Answer: Answered by my reply to your question number 36 (b).

(d) If you have been testifying from memory solely state why it is that you remember this particular cargo so well.

[fol. 117] Answer: As I stated several times before, my attention was called to the damage to this shipment by the Rheinstrom Brothers Company when I returned to America in October, 1920.

(c) Is it not true that you do not have any independent recollection of these 2,955 barrels but have testified concerning the same solely by reason of having your memory refreshed from certain documents, data, paper and/or notes that were not prepared by you at the time the said barrels were being packed and/or inspected by you?

Answer: My reply to the question immediately preceding also answers this question.

Thirty-seventh Cross-interrogatory: State which of the interrogatories and which of the cross-interrogatories you have answered as a result of information obtained from sources other than your own personal knowledge, that is, from what you actually saw or did.

Answer: None.

Thirty-eighth Cross-interrogatory. As to the 466 casks and/or barrels referred to in the "Twentieth" interrogatory, describe as you did in connection with your testimony concerning the 2,955 barrels—

(a) Where they were packed.

Answer: They were packed in Modena at the plant of Ghisetti Antonio & Cia.

(b) When they were packed.

Answer: During the month of June, 1920.

(c) How they were packed.

Answer: I was not present when this lot was packed, but [fol. 118] I know that they were packed in barrels and casks.

Thirty-ninth Cross-interrogatory:

(a) Describe the difference between the cherries packed in the said 466 casks and/or barrels and those packed in the 2,955 barrels.

Answer: The cherries packed in the 466 casks and barrels were of the "Duroni" variety, grown in the vicinity of Modena, which is a harder and larger kind of cherry than those packed in the 2,955 barrels, although this lot also contained about 800 barrels of the "Duroni" cherries.

(b) Describe in detail the difference in the method of packing the said 466 barrels and/or casks and that used in packing the 2,955 barrels.

Answer: I was not present when the 466 casks and barrels were packed, but I know that they were prepared with the same process as the 2,955 barrels.

(c) Describe in detail the difference in the method of curing the said 466 barrels and/or casks and that used in curing the 2,955 barrels.

Answer: To my knowledge there was no difference in the curing method.

(d) Describe in detail the difference between the kind of solution of brine used in packing the 466 casks and that used in packing the 2,955 barrels.

Answer: As far as I know the same kind of solution was used for both lots of cherries.

(e) Describe in detail the difference in the method of preparing the said 466 casks and/or barrels to receive their contents and that method used in preparing the 2,955 barrels.

[fol. 119] Answer: As I was not present I do not know if there was any difference.

(f) What was the difference in the amount of cherries placed in each of the said 466 casks and/or barrels and the amount of cherries placed in each of the said 2,955 barrels?

Answer: I know there was some difference, but I do not know the amounts.

(g) What was the difference in the amount of brine placed in each of the said 466 casks and/or barrels and the amount of brine placed in each of the said 2,955 barrels.

Answer: I do not know.

(h) Describe the difference in the method of measuring the contents put in the said 466 casks and/or barrels and that of the said 2,955 barrels.

Answer: I was not present and therefore I cannot answer this question.

Fortieth Cross-interrogatory:

(a) Did you see the said 466 casks while they were in Genoa?

Answer: Yes.

(b) If so, describe in detail their condition when you first saw them, giving the date when you first saw them, and—

Answer: The condition of the 466 barrels and casks was good when I saw them at Genoa around the middle of July, 1920.

(c) Their condition when you last saw them, giving the date when you last saw them.

Answer: I saw this lot only once and that was when they were being unloaded from the railroad cars and being reloaded on the lighters, which was in July, 1920, at Genoa.

[fol. 120] Forty-first Cross-interrogatory:

(a) Did you see any or a part of the said 466 casks and/or barrels at the port where they placed on board the "Ansaldo"?

Answer: Yes.

(b) If so, state how many casks and/or barrels you saw.

Answer: I saw all of these 466 casks and barrels.

(c) At what port were the said 466 casks and/or barrels loaded on board the "Ansaldo"?

Answer: They were loaded on board the "Ansaldo" in Genoa.

Forty-second Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

Answer: Around the middle of July, 1920.

(b) Give the date when they were loaded on board the "Ansaldo".

Answer: I do not know exactly, but I remember that it was around the middle of July, 1920.

Forty-third Cross-interrogatory:

(a) When you first saw them at the loading port did they appear to have lost much of their brine.

Answer: No.

(b) If so, state what percentage of their brine you think they had lost.

Answer: With the exception of perhaps ten barrels that were damaged during railroad transportation, all of the other barrels and casks were in perfect condition. Those

barrels that were damaged were immediately repaired and refilled with salt water.

[fol. 121] Forty-fourth Cross-interrogatory:

(a) How long did all or any part of the said casks and/or barrels remain at the loading port before being loaded onto the steamer?

Answer: I do not know exactly, but I know that they did not stay in the port more than a day or two before being loaded on the steamer.

(b) Were they lying under cover at the loading port or were they lying in the open? Describe in detail.

Answer: I do not know if they were lying under cover or not as the lighters were moved away as fast as they were filled with the barrels and casks.

Forty-fifth Cross-interrogatory:

(a) Is it true that some of the casks and/or barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

Answer: I do not know because I was not present.

(b) State how many showed signs of leakage.

Anwser: I do not know.

(c) Give your estimate as to the percentage of brine that had leaked out of the casks and/or barrels at that time.

Answer: I do not know.

(d) Number of casks and/or barrels that showed such signs of leakage.

Answer: I do not know.

(e) Did you or did you not inform Rheinstrom Brothers that some of the casks and/or barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: I did not.

[fol. 122] Forty-sixth Cross-interrogatory:

(a) Were any of the casks and/or barrels reconditioned at the loading port?

Answer: Yes, about 10 that had been slightly damaged.

(b) Did you open any of the casks and/or barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: No, I did not.

(c) If so, state how many casks and/or barrels were so opened.

Answer: None.

(d) How many casks and/or barrels showed signs of having leaked during their transportation to the loading port?

Answer: As I stated before, only about 10 barrels showed any sign of leakage which was caused during the transportation on the railroad.

(e) State what was done to the casks and/or barrels in reconditioning them at the loading port.

Answer: The cooper fixed them with cotton and club-rush.

Forty-seventh Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 466 casks and/or barrels?

Answer: I do not know.

(b) Describe each grade or kind.

Answer: I do not know the grades or kinds packed in this lot.

Forty-eighth Cross-interrogatory:

(a) Did the master, agent or other representative of the steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 466 casks and/or barrels [fol. 123] stating that the same were in apparent good external condition, or that the same were not in apparent good external condition.

Answer: I do not know.

(b) If so, attach to your answers to these interrogatories true copies of the same.

Answer: I have none.

Forty-ninth Cross-interrogatory:

(a) Did you keep a record of the condition of the said 466 casks and/or barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected?

Answer; No, I kept no record.

(b) Attach copies of the same hereto and appropriately mark them for identification.

Answer: I have none.

Fiftieth Cross-interrogatory: As to the 845 barrels referred to in the "Thirty-eighth" interrogatory, describe as you did in connection with your testimony concerning the 2,955 barrels—

(a) Where they were packed.

Answer: Some of them were packed at Madaloni, and the others in Baiano.

(b) When they were packed.

Answer: They were packed from about May 20th up to the first part of June, 1920.

(c) How they were packed.

Answer: They were packed in barrels in the same manner as the other lots.

[fol. 124] Fifty-first Cross-interrrogatory:

(a) Describe the difference between the cherries packed in the 845 barrels and those packed in the 2,955 barrels.

Answer: There was no difference in the cherries packed in the 845 barrels and those packed in the 2,955 barrels.

(b) Describe in detail the difference in the method of packing the said 845 barrels and that used in packing the 2,955 barrels.

Answer: There was no difference in the method of packing.

(c) Describe in detail the difference in the method of curing the said 845 barrels and that used in curing the 2,955 barrels.

Answer. There was no difference in the method of curing.

(d) Describe in detail the difference between the kind of solution of brine used in packing the 845 barrels and that used in packing the 2,955 barrels.

Answer: There was no difference in the solution used.

(e) Describe in detail the difference in the method of preparing the said 845 barrels to receive their contents and that method used in preparing the 2.955 barrels.

Answer: There was no difference in the preparation of the barrels.

(f) What was the difference in the amount of cherries placed in each of the said 845 barrels and the amount of cherries placed in each of the said 2,955 barrels?

Answer: All of the 845 barrels each contained 132 kilos of net fruit, while 792 barrels of the 2,955 lot each contained [fol. 125] 130 kilos of net fruit and the balance of 132 kilos of net fruit.

(g) What was the difference in the amount of brine placed in each of the said 845 barrels and the amount of brine placed in each of the said 2,955 barrels?

Answer: There was no difference in the amount of brine placed in the barrels of these two lots.

(h) Describe the difference in the method of measuring the contents put in the said 845 barrels and that of the said 2,955 barrels.

Answer: There was no difference in the method of measuring the contents of the barrels in those two lots.

Fifty-second Cross-interrogatory:

(a) Did you see the said 845 barrels while they were in Genoa?

Answer: I do not remember having seen this lot of 845 barrels at the port of shipment, but I want to add that they were shipped from Naples and not Genoa.

(b) If so, describe in detail their condition when you first saw them, giving the date when you first saw them, and——

Answer: I remember nothing about their condition.

(c) Their condition when you last saw them, giving the date when you last saw them.

Answer: I do not remember seeing them at the port of shipment.

Fifty-third Cross-interrogatory:

(a) Did you see any or a part of the said 845 barrels at [fol. 126] the port where they were placed on board the "Ansaldo" and—

Answer: I do not remember.

(b) If so, state how many barrels you saw.

Answer: I do not remember.

(c) At what port were the said 845 barrels loaded on board the "Ansaldo"?

Answer: They were loaded on board the "Ansaldo" at Naples.

Fifty-fourth Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

Answer: I do not remember.

(b) Give the date when they were loaded on board the "Ansaldo".

Answer: Although I do not remember having been present, I know that they were loaded around the end of July, 1920.

Fifty-fifth Cross-interrogatory:

(a) When you first saw them at the loading port did they appear to have lost much of their brine?

Answer: I do not remember having seen them.

(b) If so, state what percentage of their brine you think they had lost.

Answer: I do not know.

Fifty-sixth Cross-interrogatory:

(a) How long did all or any part of the said 845 barrels remain at the loading port before being loaded onto the steamer?

Answer: I do not know.

(b) Were they lying under cover at the loading port [fol. 127] or were they lying in the open; describe in detail.

Answer: I do not know.

Fifty-seventh Cross-interrogatory:

(a) Is it true that some of the barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

Answer: I do not know.

(b) State how many showed signs of leakage.

Answer: I do not know.

(c) Give your estimate as to the percentage of brine that had leaked out of the barrels at that time.

Answer: I do not know.

(d) Number of barrels that showed such signs of leakage.

Answer: I do not know.

(e) Did you or did you not inform Rheinstrom Brothers that some of the barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: No, I did not

Fifty-eighth Cross-interrogatory:

(a) Were any of the barrels reconditioned at the loading port?

Answer: I do not know.

(b) Did you open any of the barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: No, I did not.

(c) If so, state how many barrels were so opened.

Answer: None, by me.

[fol. 128] (d) How many barrels showed signs of having leaked during their transportation to the loading port?

Answer: I do not remember.

(e) State what was done to the barrels in reconditioning them at the loading port.

Answer: I do not know.

Fifty-ninth Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 845 barrels.

Answer: Only first grade fruit was packed in this lot of 845 barrels, and I do not remember whether there were a few barrels containing second choice fruit, if so, there were only from 20 to 30 barrels of such second grade fruit.

(b) Describe each grade or kind.

Answer: I have no further description to make to what I have just said in answer to question number 59 (a).

Sixtieth Cross-interrogatory:

(a) Did the master, agent or other representative of the steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 845 barrels stating that the same were in apparent good external condition?

Answer: I do not know.

(b) If so, attach to your answer to these interrogatories true copies of the same.

Answer: I have none.

Sixty-first Cross-interrogatory:

(a) Did you keep a record of the condition of the said [fol. 129] 845 barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected?

Answer: I kept no record.

(b) Attach copies of the same hereto and appropriately mark them for identification.

Answer: I have none.

Sixty-second Cross-interrogatory:

(a) With whom have you discussed the matters about which you have been testifying prior to the giving of your testimony?

Answer: I discussed this matter with the Rheinstrom Brothers when I returned to Cincinnati in October, 1920, and a year or so later occasionally with Mr. Kiefer.

(b) When did you discuss this matter last with Mr. August Kiefer?

Answer: I last discussed this matter with Mr. August Kiefer when I met him in Rome in the evening of April 14th, 1929.

Sixty-third Cross-interrogatory: Give the names of all persons who have been present in the room during the taking of all or a part of your testimony.

Answer: No one but Wm. Oscar Jones, Consul of the United States of America at Rome, Italy.

Sixty-fourth Cross-interrogatory:

(a) Have you ever seen or had read to you these cross-interrogatories or a translation thereof prior to giving your testimony.

Answer: No.

[fol. 130] (b) If so, state when and where you saw them and/or had them read to you.

Answer: I never saw them or had them read to me.

(c) By whom they were shown or read to you?

Answer: By no one.

(d) Had you been informed by any one as to the nature of these cross-interrogatories?

Answer: No.

Sixty-fifth Cross-interrogatory:

(a) Have you ever seen or had read to you the interrogatories or a translation thereof prior to giving your testimony?

Answer: Yes.

(b) If so, state when and where you saw them and/or had them read to you.

Answer: I received a copy of the interrogatories from Mr. Kiefer by mail on March 2nd, 1929.

(c) By whom they were shown or read to you?

Answer: They were sent to me by Mr. Kiefer from Germany, so I saw and read them myself.

(d) Had you been informed by any one as to the nature of the interrogatories?

Answer: Yes, since I read the copy which I received from Mr. Kiefer I was naturally fully informed as to the nature of the interrogatories.

Bigham, Englar, Jones & Houston, Proctors for Libellant.

[fol. 131] LIBELLANT'S EXHIBIT 2

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

THE RHEINSTROM BROTHERS COMPANY, Libellant,

against

S. S. "ANSALDO SAN GIORGIO I," SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant

Be it remembered that on Wednesday, November 12th, 1930, pursuant to Notice of Taking Deposition De Bene Esse, a copy of which is hereto annexed, at the offices of Messrs. McCutchen, Olney, Mannon & Greene, Balfour Building, in the City and County of San Francisco, State

of California, personally appeared before me, Frank L. Owen, a Notary Public in and for the City and County of San Francisco, State of California, duly appointed and authorized by law to administer oaths and affirmations, etc.

RUDOLPH G. JOHNSON, a witness called on behalf of libellant.

Messrs. McCutchen, Olney, Mannon & Greene, by Charles E. Finney, Esquire, on behalf of Messrs. Bigham, Englar, Jones & Houston, appeared as proctors for libellant; William Denman, Esquire, by Lyman Henry, Esquire, on behalf of Messrs. Loomis & Ruebush, appeared as proctors for claimant; and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole [fol. 132] truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness, set to be taken on October 24, 1930, the date mentioned in the annexed copy of notice, may be taken de bene esse on behalf of the libellant, at the offices of Messrs. McCutchen, Olney, Mannon & Greene, in their deposition room, Balfour Building, in the City and County of San Francisco, State of California, on Wednesday, November 12, 1930, before said Frank L. Owen, a Notary Public in and for said City and County of San Francisco, State of California, and in shorthand by Harold H. Hart.

RUDOLPH G. JOHNSON, produced as a witness on behalf of the libellant, having been duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. Finney:

Q. What is your full name?
A. Rudolph G. Johnson.
Q. What is your business, Mr. Johnson?
A. Cargo surveyor and appraiser.
Q. With what firm are you active?
A. Koehler, Kemp & Koehler.

Mr. Henry: Mr. Finney, will we have the usual admiralty stipulation with regard to objections, for reserving the [fol. 133] ordinary objections, and waiving now the objections regarding the form of the questions?

Mr. Finney: Yes.

Q. How long have you been associated with Koehler, Kemp & Koehler?

A. Seventeen years.

Q. In your business, and in your connection with Messrs. Koehler, Kemp & Koehler, what is the general nature of the work that you do?

A. Surveying and appraising damaged cargoes mostly; on occasions, we are called in on matters that might come up in connection with stowage and one thing and another.

Q. Have you had experience in the examination of barreled cargo; that is, cargo commodities shipped in liquids, in barrels?

A. Yes, considerable.

Q. You have had experience in making surveys and examinations of various commodities shipped in liquids in barrels, have you?

A. Yes, sir.

Q. And have you had such experience with different kinds of barrels containing liquids?

A. Yes.

Q. Does this experience also include estimating the extent of damage or depreciation to commodities shipped in liquids in barrels?

A. Yes, it does.

Q. Can you give us any idea of how many cargoes of various commodities shipped in liquids in barrels you have examined and estimated the damages on?

A. Well, that would be pretty hard to say. I would say on an average of from five to ten a month.

Mr. Henry: Are you speaking now with regard to his experience as of the date of the examination which was made, or subsequently?

[fol. 134] By Mr. Finney:

Q. I understand your experience as of to date is seventeen years?

A. Yes, sir.

Q. At the time of this examination, it would have been about seven or eight years?

A. Seven, yes, sir.

By Mr. Henry:

Q. The same answer would have been given with regard to the familiarity with barreled damage on the date of the injury in question?

A. Yes, about the same proportion. It is pretty hard to give a definite answer on that. Some seasons you have more of a certain commodity than others; but on the average I would say the answer is fairly correct.

By Mr. Finney:

Q. And had you had that experience of seven or eight years at the time you made the examination of the cargo that is involved in this case?

A. Yes, sir.

Q. And at that time, in 1920, would the number of cargoes or commodities shipped in liquids in barrels that you had examined and estimated the damage or depreciation on, run into the hundreds or thousands, or what?

A. It would go pretty close to a thousand, I should say.

Q. Have you been associated with Koehler, Kemp & Koehler all the time since you have been in this business?

A. Yes, sir, I have.

Q. So you had been with them about seven years at the time of this examination or survey?

A. Yes, sir.

[fol. 135] Q. At the time that you made the examination or survey involved in this action, you were located in New York?

A. Yes, sir.

Q. And had been during all your experience up until that time?

A. Except when I was on out-of-town cases.

Q. Your headquarters at all times were in New York, were they?

A. Yes, sir.

Q. What is your capacity with Messrs. Koehler, Kemp & Koehler at the present time?

A. Manager of their local office here.

Q. You have moved out here and taken that position somewhat recently, have you not?

A. Yes, sir.

Q. Does the firm of Koehler, Kemp & Koehler, and did they in 1920, when this examination was made, do a considerable amount of the particular type of survey that was involved in this case?

A. Yes. As a matter of fact, they examined, I dare say, the most of the damaged cherries that came into the Port of New York.

Q. And had you, during the time that you were associated with them, conducted or participated in those examinations?

A. A great number of them, yes, sir.

Q. You testified at the trial of this action on the merits in the United States District Court for the Southern District of New York, in October, 1927, did you not?

A. Yes, sir.

Q. Your name is contained in the transcript of that trial as Rudolph P. Johnson; and I note that you have here stated that your name is Rudolph G. Johnson. I presume that Rudolph G. Johnson is correct, and that the initial "P" is erroneously printed in the transcript; is that correct?

A. That is correct.

[fol. 136] Q. Did you examine the cargo discharged at New York and Philadelphia from the steamship "Ansaldo San Giorgio I," in the latter part of August, 1920, in New York, and in September, 1920, in Philadelphia?

A. Yes, sir.

By Mr. Henry:

Q. Just a moment. The cargo? Do you want to make that more explicit? Did you examine all the cargo on the boat?

A. No. Shall I answer?

By Mr. Finney:

Q. Yes, that is all right. Go ahead.

A. No, I examined mainly the damage sustained by these particular shipments of cherries.

By Mr. Henry:

Q. Were you employed to examine any other cargo other than that for the consignors here?

A. I don't recollect definitely on that. I might have had occasion to examine other shipments.

Q. But you don't remember whether——

A. I personally didn't have any other shipment than that.

Q. That is what I mean.

A. Yes.

By Mr. Finney:

Q. You made an examination or survey of some of the cargo on the "Ansaldo San Giorgio I," at those times and places at the request of whom, Mr. Johnson?

A. The Ætna Insurance Company of Hartford.

Q. They were the underwriters?

A. Yes, sir.

[fol. 137] Q. And what particular cargo from this ship did you examine?

A. What particular cargo?

Q. What was the commodity?

A. Cherries in brine consigned to Rheinstrom Brothers Company.

Q. For what purpose did you make your examination or survey?

A. For the purpose of determining the cause and extent of damage sustained.

Q. Where was the cargo when you made your examination of it in New York?

A. The shipment of 845 barrels destined to New York and discharged was on the farm at the foot or in front of Pier 25, North River.

Mr. Henry: At this time, I think it should be shown that Mr. Johnson is now reading from his notes to refresh his memory, as to the answers that he is giving. Is that correct?

Mr. Finney: Yes, he does as to some answers. He did as to the last.

Mr. Henry: Yes.

Mr. Finney: As to the location of the cherries.

The Witness: Also the quantity.

By Mr. Finney:

Q. Yes. Was any of this shipment of cherries in these barrels still on the ship, or were they all on the farm?

A. No, they had all been discharged from the steamer. Some of them were on the Old Dominion Steamship Company's Lighter "No. 50"; but the most of them were on the farm.

Q. In what sort of containers was this shipment of cherries; that is, was it in barrels or some other container?

A. In wood barrels.

Q. Did you examine these barrels and the contents of the [fol. 138] barrels which had been taken from the ship, and were on the farm, and those that were on the lighter, too?

A. Yes, sir.

Q. This shipment that you examined in New York, consisting of 845 barrels, what was the size of those barrels?

A. They contained 132 kilos of cherries.

Q. That is, net?

A. Net weight.

Q. Could you state the time when you made this examination of the shipment at New York; that is, the date?

A. August 28th, 1920, and August 27th, too.

Q. Will you please describe generally what condition you found with respect to the barrels and their contents upon your examination of this shipment in New York?

A. Many of the barrels were more or less seriously crushed at the bilges and quarter bilges; and a further quantity showed indications of leakage to a more or less extent at the chimes and/or head-stave seams, or at the point where the staves or head were broken. As a result of these conditions, the brine had leaked out of the containers, and the fruit in a number of instances was badly rotted, and in some instances worthless.

Q. You went on the ship on one or more occasions, did you?

A. I went on the ship the first examination. The steamer was there still discharging cargo.

Q. And what condition did you find there on the ship with respect to the damaged barrels or fruit from the damaged barrels?

A. Why, I observed conditions in the No. 4 hold, where we found barrels of cherries of another shipment which

were being discharged. There we did not note any quoins underneath the lower tier of barrels.

[fol. 139] By Mr. Henry:

Q. Just a minute. Is Mr. Johnson testifying regarding the cargo in question now, or to another cargo which he saw on the vessel?

A. Other cargo.

Mr. Henry: I object to the testimony in that regard, because it is irrelevant as to the matter in issue here.

The Witness: All right.

Mr. Henry: At least Mr. Johnson should confine his testimony to the particular cargo in question if for no other reason than to save time. It is immaterlai what damage or lack of damage was observed with regard to other cargoes.

By Mr. Finney:

Q. Do you know what the condition of the ship generally was in those holds where this particular cargo had been taken out?

A. I can tell you what I observed there at the time.

Q. Yes.

A. This particular shipment that I refer to, 845 barrels, that was said to be stowed in No. 1 and 3 holds of the vessel. Discharge therefrom had been completed; and we noted an accumulation of brine on the ceiling and a large quantity of loose cherries on the floor of both compartments, together with a quantity of broken staves and iron hoops from barrels, which had become broken. We noted particularly also that both of these compartments had no tween decks.

Q. But you did make an examination of these barrels and cherries of this 845 barrel shipment to determine, among other things, the nature and extent of the damage or de-

[fol. 140] preciation to them, is that correct?

A. Yes. The damaged barrels were segregated by the consignee's representative, who was there from Cincinnati; and when that work had been completed, we examined every barrel on which there was any question of damage to contents.

Q. In your testimony at the trial of this case on the merits, I believe you stated that you made a detailed report

with respect to the extent of the damage and the then condition of the barrels and casks, and their contents?

A. Yes, sir, I did.

Q. And upon your examination, did you make estimates of the depreciation to these barrels and cherries?

A. Yes. We examined each barrel. The bungs were removed, and we had a long trier, or a sampler, that is customarily used for this commodity. It consists of a handle with a sort of a three-wired arrangement, going down, which the cherries stick in when you pull it up; and that rod or sampler is inserted in the bung right down to the bottom, and then the cherries are picked up, and they are put out in a pan, and those cherries are examined carefully to determine the proportion of those cherries that are damaged, and to what extent the damaged cherries can be used. The damaged cherries, or a soft cherry can quite often be used for broken pieces, or something of the sort, instead of a whole cherry; and the damage is based upon that careful examination, and by agreement between the surveyor and the consignee's representative.

Q. There was a consignee's representative there at this time?

A. Oh, yes.

Q. Dealing now with the shipment of 845 barrels examined at New York, would you state what you found as to the extent of the depreciation of the various barrels of [fol. 141] cherries examined by you there, giving the number of barrels and percentage of depreciation?

Mr. Henry: I think that question is ambiguous, in that it might be taken to refer to the depreciation of the containers, not merely the contents. I do not know whether you intend to cover both; but I think they should be separated, anyway.

By Mr. Finney:

Q. Have you the number of barrels and the percentage of depreciation of the contents; and can you give us that?

A. Yes, sir. After detailed examination, as I indicated before, we compiled what might be termed a resume.

Mr. Henry: Just a minute, Mr. Johnson. You just said, "we compiled." I understood that you were——

The Witness: I am speaking——

Mr. Finney: You were acting for the firm.
The Witness: For the firm.

By Mr. Henry:

Q. Then these notes that you are referring to are merely your own notes?
A. No, they belong to the firm.
Q. You understand what I mean: They were made by you, but you are refreshing your memory from something that was compiled in conjunction——
A. In fact, this is a record I prepared myself.
[fol. 142] Q. Yes, but you said "we compiled a report."
A. That is a habit I have gotten into, speaking for the firm.
Q. I thought that there might have been some one else with you?
A. No. When we dictate a letter, it is always "we"; that is a habit that I have gotten into.
Q. That is a pretty good habit.
A. I will eliminate any sound barrels. You don't want me to repeat those. No purpose of putting that in.

Mr. Finney: No. Just those that were damaged.
The Witness: This is from the New York shipment. There were eleven barrels that had the cherries damaged to the extent of 10%.
Mr. Henry: Now, then— Well, I will take that up on cross examination.
The Witness: On which we agreed with the consignee to a measure of damage of 10%.
Mr. Finney: Yes. Go right ahead.

By Mr. Henry:

Q. These percentages that you are giving us, Mr. Johnson, are percentages of agreement with the consignee, or are they the estimate of yours, your actual estimate of the damage?
A. They are both.
Q. In every case would you agree?
A. We wouldn't have agreed if the figure finally determined wasn't in accordance with our views.

By Mr. Finney:

Q. These estimates of depreciation that you are giving are estimates of depreciation based upon your own ex-

[fol. 143] amination in view of your experience in examining this type of cargo, is that true?

A. Yes, sir.

Q. Will you just continue and give the numbers and percentages?

A. Nine barrels with contents damaged to the extent of 15%; twenty barrels with contents damaged to the extent of 25%; thirteen barrels with contents damaged to the extent of 40%; twelve barrels with contents damaged to the extent of 50%; twenty-nine barrels with contents damaged to the extent of 60%; thirty-one barrels with contents damaged to the extent of 75%; fourteen barrels with contents damaged to the extent of 90%; sixteen barrels with contents damaged to the extent of 100%; that is all.

Q. Were there any barrels in that shipment that you designated as sound, but to which there was in fact damage done to the barrels?

A. Yes, sir. There is a total of 35 barrels included with those which we examined, which had various breakages to the containers, but which the cherries were accepted by the consignee as sound.

Q. Did you later make a similar examination with respect to the shipment of cherries in barrels from this same ship which had been discharged at Philadelphia?

A. Yes, sir, we did.

Q. Had this cargo of cherries been taken off the ship when you made your examination in Philadelphia?

A. Yes, sir, they had.

Q. Was this examination that you made in Philadelphia also an examination of cherries in brine consigned or shipped to Rheinstrom Brothers?

A. Yes, sir.

Q. What, generally, was the condition of the barrels of cherries which you found in your examination at Philadelphia, as compared with the condition that you found in [fol. 144] the other shipment at New York?

A. The condition of barrels was very similar; but there was more extensive breakage insofar as quantity of packages that were injured was concerned.

Q. That is, more extensive at Philadelphia?

A. Yes.

Q. How many shipments of these cherries did you examine at Philadelphia?

A. Five different shipments.

Q. Were those shipments divided up into two general lots?

By Mr. Henry:

Q. Now, I think I will object to that as being unnecessarily leading.

A. There were five different lots, having these marks: RBM 792 barrels. Then apparently a part of the same lot, in that it was the same mark, 40 barrels——

By Mr. Henry:

Q. Now, are you certain of that?

A. Am I certain of it? Yes, sir.

Q. You say apparently. You don't know——

A. Well, I presume it is. It has the same mark. It is quite usual to mark it that way.

Q. But you say apparently the same. Either it is or it is not, isn't that right?

A. The records would show that, I should presume. There were also the following: R. B. V. 240 barrels; R B. S., 1,883 barrels; and U. G. 21 casks, weighing 230 kilos; 230 casks weighing 182 kilos; 15 casks, weighing 147 kilos, and 200 what I would term kegs, weighing 35 kilos.

[fol. 145] By Mr. Henry:

Q. Is that designated as kegs in your notes?

A. No, it is listed here as a cask. There isn't much distinction between them.

Mr. Henry: May we have this in the record, then Mr. Finney: That the two lots that Mr. Johnson is referring to are, one the 2,955 barrel lot, and a 466 barrel and cask lot, itemized as before stated by Mr. Johnson?

Mr. Finney: Yes.

Q. Taking first this shipment of 2,955 barrels, can you tell us the sizes of these barrels?

A. They were all 130 to 132 kilos.

Q. Will you state what you found as to the extent of depreciation of the various barrels in this 2,955 barrel lot which you examined in Philadelphia, giving the number of barrels, and the percentage of depreciation or damage to the contents of the barrels?

A. There was 105 barrels which had various breakages, and the contents were accepted as sound. 51 barrels which had the contents damaged to the extent of 10%; 35 barrels, which had the contents damaged to the extent of 15%; 8 barrels, which had the contents damaged to the extent of 20%; 100 barrels, which had the contents damaged to the extent of 25%; 79 barrels, which had the contents damaged to the extent of 40%; 116 barrels, which had the contents damaged to the extent of 50%; 95 barrels, which had the contents damaged to the extent of 60%; 89 barrels, which had the contents damaged to the extent of 75%; 3 barrels, which had the contents damaged to the extent of 85%; 42 barrels, which had the contents damaged to the extent of [fol. 146] 90%; 97 barrels, which had the contents damaged to the extent of 100%. I also looked at 7 barrels of culls, which were accepted as sound.

Q. In this shipment of 2,955 barrels, relative to which you have just given the number of barrels and percentage of depreciation or damage, were any of those damaged barrels culls, or were they all the regular shipment?

A. There were seven barrels of culls, which were accepted as sound.

Q. But the number of barrels and the damage that you have stated do not in any instance refer to culls?

A. No, sir.

Q. Did you make note at the time of your examination as to the marks of barrels, such as R.B.M., R.B.V., or R.B.S., so that you could give us the particular lot to which the damaged barrels belonged, with reference to those numbers or letters?

A. Why, these marks weren't clear; and we found so many in which there were no marks, or which were smeared up with the brine, that we found it impracticable to take the marks. In other words, it would not serve any purpose.

Q. Referring now to the 466 barrel or cask lot which you examined in Philadelphia, would you state what was the estimated extent of the depreciation or damage to the contents of the various barrels, giving us at the same time the sizes of the various damaged barrels or casks, and the number of barrels, and the percentage of depreciation?

A. These will be kegs weighing 35 kilos. Three kegs with contents accepted as sound. One keg——

By Mr. Henry:

Q. Now, those are kegs accepted as sound, but possibly [fol. 147] some slight evidence of physical damage on the outside?

A. Yes, sir.

Q. There were many kegs besides those that were accepted as sound? This refers to those that there might have been some question about?

A. Yes. As I explained before, I examined the barrels set aside by the consignee as damaged.

Q. I see.

A. One keg with contents damaged to the extent of 25%; two kegs with contents damaged to the extent of 50%; one keg with contents damaged to the extent of 60%; four kegs with contents damaged to the extent of 75%; three kegs with contents damaged to the extent of 100%. Now, casks, weighing about 230 kilos: 2 casks with contents damaged to the extent of 25%; 1 cask with contents damaged to the extent of 40%; 5 casks with contents damaged to the extent of 50%; 4 casks with contents damaged to the extent of 60%; 23 casks with contents damaged to the extent of 75%; 1 cask with contents damaged to the extent of 85%; 5 casks with contents damaged to the extent of 90%. That is all of those. Now, casks weighing 182 kilos.

By Mr. Henry:

Q. Do you call these casks or kegs?

A. It would be a cask or a barrel. It wouldn't be much difference. Five casks with contents accepted as sound; 1 cask with contents damaged to the extent of 10%; 1 cask with contents damaged to the extent of 15%; 6 casks with contents damaged to the extent of 25%; 6 casks with contents damaged to the extent of 40%; 15 casks with contents damaged to the extent of 50%; 18 casks with contents damaged to the extent of 60%; 1 cask with contents damaged to the extent of 65%; 30 casks with contents damaged [fol. 148] to the extent of 75%; 1 cask with contents damaged to the extent of 85%; 12 casks with contents damaged to the extent of 90%; 4 casks with contents damaged to the extent of 100%.

By Mr. Finney:

Q. In this 466 barrel or cask lot, the invoices show that the shipment was composed of a first selection and a second

selection; the second selection bearing the mark "II". Did you at the time of your examination make a record as to which of these grades the damaged casks or barrels belonged?

A. No, I did not.

Q. You have no record of that, and couldn't state now to which grade they belonged?

A. No, sir.

Q. In your testimony here, Mr. Johnson, you have referred to some barrels of cherries or casks of cherries, as having sustained a 100% loss. Do you mean to say that in those cases there was a short delivery of the barrels, or merely that they were so badly broken that the contents deteriorated——

Mr. Henry: I think it would be better to let the witness testify.

Q. (Continuing:) —and that they were totally worthless.

Mr. Henry: I object to that as leading and suggestive. I think that the question should be framed to let the witness testify.

By Mr. Finney:

Q. In your testimony here, you referred to some of the [fol. 149] barrels of cherries as having been 100% depreciated or damaged. What do you mean by that, Mr. Johnson?

A. I mean that I examined those barrels on the pier and found the contents damaged to such an extent that that measure of damage was fair and equitable.

Mr. Henry: That is, of course, at best your conclusion.

The Witness: Well, there is not much to do with cherries when they are damaged 100%.

By Mr. Finney:

Q. Did they have a bad odor to them?

A. Pretty rotten.

Q. Rotten to the extent that they were totally worthless?

A. Yes.

Q. In the survey report that you rendered after your examination of these cherries, did you describe some of the barrels as having bilge staves broken and patched, do you remember?

A. Yes, sir, quite a number of them.

Q. At what time did you mean that the staves were patched, Mr. Johnson?

A. The patches had every indication of having been put on recently.

Mr. Henry: Now, just a minute. I think before Mr. Johnson could possibly testify on a subject like that, some foundation should be laid, or at least the facts upon which Mr. Johnson is apparently basing a very vague conclusion should be set forth.

By Mr. Finney:

Q. Were the patches that were on these staves new or old?

[fol. 150] Mr. Henry: I think that you should let the witness testify.

Mr. Finney: That is in the alternative, whether they were new or old.

A. Oh, I saw them put on to a large extent.

Mr. Henry: That is assuming, Mr. Finney, that you are competent to decide what means had been used to determine the conclusion that the witness just gave.

By Mr. Finney:

Q. Did you see the patches being put on the barrels?

A. I did. Not all of them; but a good many of them.

Q. Were there any people there working on the barrels when you were there making your examination?

A. Yes, sir, there was several coopers working on the barrels all the time.

Q. Were they patching the staves and otherwise repairing the barrels?

A. Yes, and placed them in a condition so they could be transported to Cincinnati, where they were intended for.

Q. Could you form any opinion, from looking at the barrels, whether these staves were recently put on or not; whether the patches were put on the staves?

A. Yes, you could tell by looking, whether a patch is recent or not with a reasonable degree of accuracy.

Mr. Henry: I think that is the same question, Mr. Finney.

By Mr. Finney:

Q. What would you say, from what you observed there [fol. 151] as to the barrels being repaired, and your observation of the patches on the staves, as to whether or not the patches were put on the staves after the cargo was discharged from the ship, or before?

A. After discharge from the steamer.

Mr. Henry: I think that is the same question; and the same objection, also.

Mr. Finney: As I understand it, you don't object to him testifying that he saw the coopers putting them on?

Mr. Henry: If he saw the coopers putting on the patches, why, that is a fact that he saw; and certainly he can testify to it.

Mr. Finney: And the question was, basing his last answer on having been there and seeing the barrels being patched, and also the looks of the patches and everything else that he observed, whether or not the patches were put on recently.

Mr. Henry: Yes, but he said merely that he remembered that he saw some patches being put on; and his answer to your question does not apply to all the patches, I assume; and as to that we reserve our objection.

Mr. Finney: That is all.

Cross-examination.

By Mr. Henry:

Q. Mr. Johnson, on direct examination I understood you to say that your examination of barrel damage would be close to 1,000. About how many examinations of cargo did you make a year before the time you examined the cargo in question?

A. Well, on an average of two or three a day.

Q. And what percentage of those were, on the average, [fol. 152] an examination of barrels of cherries in brine?

A. Cherries in brine?

Q. Yes. Would you say it was relatively a small percentage of the examinations that you made?

A. Yes, it would be.

Q. So it would be very doubtful whether you had made a thousand examinations of barrels in brine up to that time?

A. I didn't mean to convey that.

Q. You meant that you had up to the present time made a thousand examinations of barreled goods?

A. No. What I meant to say was up to that time I had examined, roughly speaking, say, a thousand shipments of barreled material.

Q. But that a very small percentage of that would be an examination of barrels in brine, that is correct?

A. Barrels in brine? No, there is quite a number of commodities that come in barrels in brine.

Q. Roughly speaking, up to the time of this particular cargo examination, would you say that you had examined how many shipments of cherries in brine?

A. Oh, I would say between 75 to 100 different shipments, at least.

Q. How did you determine the weight of these barrels in the New York, or the 845 shipment?

A. Why, you can tell by the size of the barrels generally; and then your knowledge of how they are usually shipped, and so on. That would come from experience.

Q. You testified, I believe, that you couldn't tell the difference between a 130 and 132 keg, and yet you can testify positively as to the weight of all the barrels in the New York shipment. Those are only approximate.

A. I haven't meant to testify as to the weight of the barrels here. I didn't weigh them.

[fol. 153] Mr. Henry: Well, I think, then, that all the testimony that Mr. Johnson has given regarding the weight of the barrels should be stricken from the record.

Mr. Finney: Oh, no.

The Witness: I can tell the difference between a 182 kilo barrel as compared with a 130 kilo barrel, where there is such a wide distinction, but there isn't any one that can tell the difference between 130 and 132.

By Mr. Henry:

Q. I am just trying to find out regarding that. The weight, as you testified positively, in regard to the shipments, and particularly with regard to the New York shipments, is in the record. So you would say that that was an estimate, rather than a positive statement?

A. The weight in all instances was an estimate. I didn't weigh the barrels.

By Mr. Finney:

Q. Would you say it was a very accurate or a very loose estimate?

A. No, a rough estimate. I couldn't tell you whether it was 130 pounds, or 140 pounds, by looking at it, nor can any one else. Quite frequently the barrels are marked with the weight.

By Mr. Henry:

Q. You testified that a large quantity of cherries was found on the floor of the hold in the New York shipment. Now, I think that you might be a little more explicit in stat- [fol. 154] ing what you meant by a large quantity there?

A. Well, normally speaking, discharging a shipment of cherries, you shouldn't have any loose ones, because it indicates——

Q. No, just answer the question. How many, approximately, would you say there were there, or have you some means of measurement as determining the contents of the barrels?

A. I couldn't say anything at all, other than that they were two or three inches deep, at least.

Q. Do you have any independent recollection, Mr. Johnson, of this outside of your notes?

A. I have not refreshed my memory on this. I am speaking from memory on this question of loose cherries.

Q. But the other facts that you testified to, you have no independent recollection after this period of time with regard to those facts?

A. In certain instances I recollect very clearly.

Q. Just state one instance in the examination where I found that you were referring to your notes that you have stated facts from an independent recollection?

A. Well, for instance, on the matter of cooperage.

Q. But all other figures you have given are estimates and based on your notes, is that right?

A. Oh, yes, that is right.

Q. As I understood you, the way you determined the extent of the damage was by pulling out a number of cherries from the barrels?

A. Yes, sir.

Q. And you feel that that is a satisfactory means of determining the damage to the entire contents of that barrel, if you find a certain part of the few that you take out to be damaged, is that the basis of your testimony?

A. Well, a more satisfactory way to determine it would be to open the heads and remove the cherries.

[fol. 155] Q. And you didn't do that?

A. No, there were too many damaged barrels to do that.

Q. You merely pulled out a few of the cherries and based an estimate of the damage as to the contents upon those few?

A. I wouldn't say a few.

Q. How many would you say?

A. A couple of hands full.

Q. How many cherries are there in a keg?

A. I never counted them.

Q. It would be a very small percentage of the entire contents?

A. It would, yes, sir.

Q. And then a more satisfactory means would be to examine the entire contents?

A. That isn't possible, Mr. Henry.

Q. That is your conclusion. You wouldn't say, would you, Mr. Johnson, that the Philadelphia shipment was proportionately any greater damaged than the New York shipment, would you?

A. Yes, I would.

Q. I mean, being a larger shipment, wasn't it proportionately equal to the smaller New York shipment?

A. No. I think the damage to the Philadelphia cargo was more extensive and more severe.

Q. You have no means of determining why that was so?

A. The records will show that.

Q. No, I am asking you for your opinion. You have given your opinion before as to how the damage was caused—

A. I am basing my opinion on the examination that I made.

Q. I am asking you why you feel that there was a greater damage to the Philadelphia cargo than there was to the New York cargo?

A. The cherries were more seriously damaged as a general proposition.

[fol. 156] Q. No, you don't understand my question, Mr. Johnson.

A. Maybe I don't.

Q. You have just testified that there was a greater damage to the Philadelphia cargo. I am asking you now as an expert to give the reasons upon which you base your conclusion as to why the Philadelphia cargo was more seriously damaged than the New York cargo?

A. Based on my observations.

Mr. Finney: I think he has answered that.

Mr. Henry: He has testified as to why the New York cargo and the Philadelphia cargo received a certain damage. That was on the former examination. I am now asking——

Mr. Finney: You mean at the former trial?

Mr. Henry: Yes. I am now asking him as an expert why he believes that there was a greater damage to the Philadelphia cargo than to the New York cargo.

Mr. Finney: As I understand it, he saw both cargoes.

By Mr. Henry:

Q. Exactly. I am not saying that he did not testify accurately that there was a greater damage. I am asking him now as an expert to give the reasons why he believes there was a greater damage to that cargo. He testified before, in other words——

A. Well, I think I know what you are driving at, now. The examination I made in New York was on August 27th, [fol. 157] and in Philadelphia, my first examination was made on September 14th.

Q. So it is quite likely, isn't it, Mr. Johnson, that some of this damage occurred while the goods were on the farm in Philadelphia?

A. They weren't on the farm in Philadelphia; they were on a pier.

Q. Well, on the pier. I mean outside of the vessel, because the vessel had left, as I understand it, when you arrived in Philadelphia.

A. Yes, but only a couple of days. I don't know just when the steamer finished discharging in Philadelphia.

Q. But it is quite possible and quite likely that there was damage while the cargo was on the dock? I mean, was

there no other cause for that damage other than the time it spent on the dock?

A. I would say that the increase in damage to the cherries at Philadelphia was due to the difference in time or the delay.

Q. I see.

A. Between the examination in New York and when I examined them in Philadelphia.

Q. Now, you testified that some of the barrels were broken and some of the cherries did escape loose in the hold and upon the floor of the storage compartment?

A. Yes, sir.

Q. And you have also testified that there was a shortage. Now, isn't it true that your estimate of the percentage of damage was based not only upon the deterioration in the physical remains of the cherries, but also upon the loss in quantities of cherries in some of the barrels; in other words, a shortage of cherries from the barrels?

A. Yes, in some instances there was a shortage of cherries.

Q. Can you tell at this time what portion of your esti-
[fol. 158] mated percentages in each case represented deterioration, in the sense of deterioration to physically remaining cherries, and a shortage in the sense of a complete loss of the physical quantity of cherries?

A. I would have to go through my report in detail and pick out such packages as had a part of the contents missing.

Q. Have you an estimate there of the amounts missing?

A. No, I have not.

Q. So you couldn't give an accurate percentage at this time regarding what was short?

A. Well, I can tell you of the barrels that I have allotted to a damage of 100%, those were intact, and still remained as a barrel, and didn't have any of the contents missing.

Q. When you say intact and still remained as a barrel, you mean you picked up pieces that you assigned to be a part of certain barrels, isn't that true?

A. No.

Q. And you are not testifying now to a short shipment in the sense of a delivery of a physically intact barrel?

A. Not as far as I know, although I assume—I don't know absolutely, but I assume that the consignee may have

left the barrels on the pier, which were damaged to the extent of 100%.

Q. But my question is, Mr. Johnson, that all of the numbers of barrels, and the percentages that you have given, representing barrels and percentages of loss of contents of those barrels, which barrels were physically intact, except for crushing and damage, that the barrel was entirely there or could be reconstructed, we will say?

A. That is correct.

Q. Yes. Mr. Johnson, I understood you to say that you didn't know of the grade of these particular cherries in the [fol. 159] barrels; that is true, is it not?

A. That is correct. There was no indication made to me that there were different grades.

Q. Would it not, Mr. Johnson, influence the estimate that you made of damage, if the barrels contained different grades of cherries?

A. It would all depend upon what those grades were.

Q. If one grade was inferior in quality, in that it was not as perfectly a preserved cherry, that that would have been determined in estimating the actual value, the sound value of such cherries?

A. Yes, but your sound value would be originally less, I presume.

Q. Yes; but the grade would enter into it?

A. Yes, it would, because your No. 2 cherry wouldn't be as good as the No. 1 cherry, and it wouldn't stand up as well.

Q. But you have no record of the different grades?

A. No. We estimated, as a matter of fact, that the difference in grades in this shipment was very, very little.

Q. That is your conclusion?

A. That is my conclusion, because we didn't see anything——

Q. But your report is not made on the basis of a difference in grades?

A. No, sir. We assumed it was all one grade, with the exception of the culls.

Q. Yes. I think those were all accepted as sound, so they are not really in question. Now, Mr. Johnson, I understand that some of these barrels were old containers, and had been used for the purpose of carrying other commodities. Is it not possible that some of the damage to the cherries

occurred by reason of the contamination of the former cargo or commodity carried in the barrels?

A. I don't think so. There was no question of foreign [fol. 160] odors, or anything of that sort present.

Q. Was there any oil present in any of the damaged cherries?

A. I didn't note any. I am sure I would have, if it had been present.

Q. Regarding the cherries that remained in the hold, there was no oil there?

A. I didn't get close enough to those to observe.

Q. You didn't examine the contents of the sound barrels; you just examined those that were set aside by the consignee, didn't you?

A. Well, some of those were sound, if you will recollect.

Q. But you examined only the barrels that there might be some question on?

A. Yes, sir; and which the consignee thought there was a possibility of damage to the cherries.

Q. Upon what did you determine to be the sound quality upon which you based your percentages of damages here? These are percentages of damage of sound quality cherries, is that true?

A. I presumed they were sound when they were shipped.

Q. The question is, how did you know what was considered a sound quality cherry involved in this particular group of shipments?

A. Well, based on previous experiences, more or less.

Q. But you didn't examine any barrels that were not set aside as possible——

A. Not specifically for the purpose of determining the question of sound quality.

Mr. Henry: Yes. That is all.

Redirect examination.

By Mr. Finney:

Q. Can you tell us when you went to Philadelphia, Mr. Johnson, to make your examination there?

A. September 14th, 16th, and 22nd.

[fol. 161] By Mr. Henry:

Q. Just a moment. Mr. Johnson, I see that you are referring to two groups of notes there. You just referred to some notes on a small pocket pad or paper?

A. Yes, sir.

Q. Now, when were the notes made up on the paper that you used throughout the rest of the examination, and said notes being typewritten and on a regular size sheet of paper—when were those made up?

Mr. Finney: That is, during some part of the examination.

By Mr. Henry:

Q. I don't believe, Mr. Johnson, that you referred in this examination by me to these pencil notes; reference throughout was to the typewritten notes, isn't that true?

A. Yes. The report, of course, is a resume of these rough notes.

Q. When were they made?

A. The report? It was under way quite a time just prior to the—through the first part of October. The report was submitted to the underwriters on October 23rd.

Q. So the report was made at least a month after your examination, that is true, isn't it?

A. Yes.

Q. And it is that report that you used in the other part of your examination, with the exception of this last statement?

A. Yes, sir.

By Mr. Finney:

Q. And that report is a resume of those notes that you made there on the ground at the time?

A. Yes, sir. This is a compilation.

[fol. 162] Q. You did examine there some sound barrels of cherries among those that were set aside, didn't you?

A. Yes, sir.

Q. So that you do know from that what the sound cherries in this particular shipment were like, do you?

A. What they should be like, do you mean?

Q. No, what the sound cherries in those barrels that were accepted as sound cherries, you know what those cherries were like?

A. Yes, sir.

Q. You saw them and examined them?

A. Yes, sir.

Q. And also I presume that from your general experience in this business, you know what sound cherries are like?

A. Yes, sir.

Q. When you examined these barrels of cherries, as I understand you, you pulled out some of the cherries from each barrel?

A. Yes, sir.

Q. And would you take those all from one place in the barrel, or various depths and places in the barrel?

A. We drove it down to the bottom of the cask in order to get some on the way up, and tried to get samples from the center, and paid particular attention in avoiding getting cherries next to the bung.

Mr. Finney: That is all.

Recross-examination.

By Mr. Henry:

Q. But that would be within the same area of the barrel, the same horizontal area?

A. In the center of the barrel?

Q. Yes.

A. Yes.

Mr. Henry: That is all.

[fol. 163] Redirect examination.

By Mr. Finney:

Q. You poked this trier clear to the bottom of the barrel, and then pulled it up, is that the way you did?

A. Yes, sir.

Q. Is that the usual method of examining cherries in barrels?

A. Yes, sir.

Q. Is that an accurate one, as far as you know, from your experience?

A. Reasonably accurate, yes.

Q. In determining the extent of damage or depreciation of the entire barrel?

A. Yes. I can mention here that it is a custom that is followed largely in an examination of damaged barrels of cherries, not only by surveyors but by importers.

By Mr. Henry:

Q. Mr. Johnson, it is chiefly used because it is expeditious?

A. Expeditious and economical.

By Mr. Finney:

Q. And has been found fairly accurate.

By Mr. Henry:

Q. Mr. Johnson, I don't believe you stated in any great detail just what caused these percentages of damage, outside of your statement that you couldn't state what percentage represented a shortage of cherries in contrast with a shortage of the barrel. You will admit that?

A. I mentioned before that I could determine from my records the number of barrels which were intact, and that the contents were worthless, in which there was no loss of cherries.

[fol. 164] Q. This is what I mean: Just what, from a chemical standpoint, caused the damage?

A. The damage was caused by a loss of the brine. They break down completely as soon as the brine is gone.

Q. So that it was the loss of brine that caused the damage?

A. Yes, sir.

Q. And that resulted in——

A. In fermentation.

Q. In fermentation?

A. And rotting of the contents. They started getting soft, and then they start to shrivel, and go on through various stages.

Q. So if the cherries were of a different grade and not as solid, they would apparently have suffered a greater damage, that is true, isn't it?

A. To an extent, yes; but if you start with a lower grade, you start off with a lower value.

Q. Yes, but——

A. And I do not think there would be any difference in that.

Mr. Finney: That is, he didn't go into the different grades?

Mr. Henry: Yes, that is his testimony.

The Witness: I didn't know there were two different grades, frankly.

Mr. Finney: Except that he just differentiated the culls.

Mr. Henry: Oh, yes, there is no question about that. That is all.

Mr. Finney: That is all.

Rudolph G. Johnson.

[fol. 165] UNITED STATES OF AMERICA,
State and Northern District of California,
City and County of San Francisco—ss.:

I certify that, pursuant to Notice of Taking Deposition De Bene Esse, a copy of which is hereto annexed, on Wednesday, November 12, 1930, before me, Frank L. Owen, a Notary Public in and for the City and County of San Francisco, State of California, at the offices of Messrs. McCutchen, Olney, Mannon & Greene, in their deposition room, Balfour Building, in the City and County of San Francisco, State of California, personally appeared Rudolph G. Johnson, a witness called on behalf of the Libellant in the cause entitled in the caption thereof; and Messrs. McCutchen, Olney, Mannon & Greene, by Charles E. Finney, Esquire, on behalf of Messrs. Bigham, Englar, Jones & Houston, appeared as proctors for the Libellant; William Denman, Esquire, by Lyman Henry, Esquire, on behalf of Messrs. Loomis & Ruebush, appeared as proctors for the Claimant; and the said witness, being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by Harold H. Hart, a competent and disinterested official shorthand reporter, and thereafter reduced to typewriting by him under my personal supervision, and was after it had been so reduced to typewriting subscribed by the witness, and the same has

been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court, as required by law.

[fol. 166] And I do further certify that the witness lives in the State of California, more than one hundred miles from the place where this cause is to be tried.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In witness whereof, I have hereunto set my hand in my office aforesaid, this 22nd day of November, one thousand nine hundred and thirty.

Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of California.
(Notarial Seal.)

[fol. 167] LIBELLANT'S EXHIBIT 4

Ent. 879

Invoice

(Place and date:) Modena, 15 Luglio, 1920.

Invoice of 466 barili ciliegie solforate in salamoia purchased by The Rheinstrom Brothers & Co., of Cincinnati, Ohio, from Ghisetti Antonio & Co., of Modena, to be shipped per s/s "Ansaldo San Giorgio I" per Filadelfia.

Marks, numbers, and quantities	Full description of goods	Price per unit	Total amount
U. G.	379 barili lordo Kg. 85310 netto Kg. 51674 ciliegie solforate in salamoia per 100 Kg.	$16.25	
	Totale		$8,394.03
U. G. II	87 barili lordo Kg. 7140 netto 4221 idem idem per 100 Kg.	$9.20	
			$388.33
	Totale		$8,782.36

merce resa franca bordo Genova

Spese non incluse

Porto ferrovia	Lit.	3760.=
Nolo	"	16448.=
Vidimazione consolare	"	50.=
Totale	Lit.	20258.=

Ordinazione ricevuta il 8 Luglio, 1920.
Contratto di vendita stabilito in valuta degli S. U. A.

[fol. 168] N. B.—Always state the cost of packing, and all other costs, charges, and expenses.

The above invoice is correct and true.

(Signature of purchaser or seller) p. Antonio Ghisetti & Co., Antonio Ghisetti (Comproprietario).

[Stamp:] Invoice presented Mar. 1, 1921

Entry 879

Invoice of Food Products

Duplicate

Purchased by Importer

Invoice No. 1312 issued in Triplicate.
Certified Jul. 20, 1920.

American Consular Service

at Florence, Italy

Date: July 15th/1920.
Seller: Ghisetti Antonio & Co., Modena.
Purchaser: The Rheinstrom Brothers & Co., Cincinnati, Ohio.
Name of vessel or railroad: S/S Ansaldo San Giorgia I.
Port of shipment: Genova.
Port of arrival: } Philadelphia (Penn.)
Port of entry: }

Amount of invoice: $8782.36.
Kind of goods: ciliegie solforate in salamoia.

[fol. 169] Form No. 138

Declaration of Purchaser or Seller or Duly Authorized Agent of Either

I, Ghisetti Antonio & Co., of Modena, do solemnly and truly declare that I am the Seller of the merchandise in the within invoice mentioned and described; that the said invoice is in all respects correct and true, and was made at the place named therein whence the said merchandise is to be exported to the United States of America; that said invoice contains a true and full statement of the time when, the place where, and the person from whom the same was purchased, or agreed to be purchased, and the actual cost thereof, price actually paid or to be paid therefor; and all charges thereon; that no discounts or commissions are contained in said invoice but such as have been actually allowed thereon; that all drawbacks or bounties received or to be received are shown therein; that no different invoice of the merchandise has been or will be furnished to anyone, and that the currency in which the invoice is made out is that which was actually paid or to be paid for the said merchandise.

I further declare that it is intended to make entry of said merchandise at the port of Philadelphia (Penn.) in the United States of America.

Dated at Modena July 17th, this — day of ——, 1920.

p. Antonio Ghisetti & Co., Antonio Ghisetti (comproprietario).

[fol. 170] Form No. 140

Consular Certificate

(Date:) Jul. 20, 1920.

I do hereby certify that the invoice described in the indorsement hereof was this day produced to me by the signer of the annexed declaration.

I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the prices given in the invoice agree with the actual market value or wholesale price

of the merchandise described in the said invoice in the principal markets of the country at the time of exportation, excepting as noted by me upon said invoice, or respecting which I shall make special communication to the proper authorities.

I further certify that a fee of $2.50 United States gold, equal to 5000, has been paid by affixing stamps to the duplicate copy of this document.
(Local currency)

Witness my hand and seal of office the day and year aforesaid.

W. Roderick Dorsey, Consul of the United States of America.

(Consular Service Fee Stamp.)

[fol. 171] Ent. 880

Invoice

(Place and date:) Savona, Italy, July the 19th, 1920.

Invoice of Cherries in brine purchased by The Reinstrom Brothers Co., of Cincinnati, Ohio, from Societa Esportazione Agr. Ligure, of Savona, Italy, to be shipped per it. s/s "Ansaldo S. Giorgio 10" sailed on the 19th July, 1920.

Marks, numbers, and quantities	Full description of goods	Price per unit $	Total amount $
R B Cincinnati	Cherries in brine = Nett weight Kilos 393.015 & $16.50 % Ks....	0.16550	64847.50
2955	(Price quoted f. o. b. Genoa.)		
Barrels	Freight		6000.00
	Insurance		320.=
	Consular Invoice.....		2.50
	Total amount..... cif New York		71170.=

Purchased on the 25 of June of 1920.=

[Stamp:] Consignee Notified Sep. 9, 1920.

N. B.—Always state the cost of packing, and all other costs, charges, and expenses.

The above invoice is correct and true. (Signature of purchaser or seller:) Soc. Esp. Agricola Ligure by (Signature illegible).

[fol. 172] Custom House Indorsement*

Marks, Quantity, and Contents
R. B. 2955 barrels
Cincinnati
Cherries in brine
gross weight Kilos
679.650.=

Ent. 880

Duplicate

Invoice of Food Products

Purchased by Importer

Invoice No. 526 issued in Triplicate.
Certified Jul. 20, 1920.

American Consular Service at Genoa

Date: 19th July, 1920.
Seller: Soc. Esportazione Agricola Ligure, Savona, Italy.
Purchaser: The Reinstrom Brothers Co., Cincinnati.
Name of vessel or railroad: Ansaldo San Giorgio I.
Port of shipment: Genoa.
Port of arrival: Philadelphia.
Port of entry: Philadelphia.
[fol. 173] Amount of invoice $71,170.=
Kind of goods, Cherries in brine.

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* Consular officers will leave all of the above indorsement blank. It is to be filled in only at the custom-house at the port of entry.

Form No. 138

Declaration of Purchaser or Seller or Duly Authorized Agent of Either

I, Soc. Esp. Agricola Ligure of Savona, Italy, do solemnly and truly declare that I am the (Purchaser or seller) seller of the merchandise in the within invoice mentioned and described; that the said invoice is in all respects correct and true, and was made at the place named therein whence the said merchandise is to be exported to the United States of America; that said invoice contains a true and full statement of the time when, the place where, and the person from whom the same was purchased, or agreed to be purchased, and the actual cost thereof, price actually paid or to be paid therefor; and all charges thereon; that no discounts or commissions are contained in said invoice but such as have been actually allowed thereon; that all drawbacks or bounties received or to be received are shown therein; that no different invoice of the merchandise has been or will be furnished to anyone, and that the currency in which the invoice is made out is that which was actually paid or to be paid for the said merchandise.

I further declare that it is intended to make entry of said merchandise at the port of Philadelphia in the United States of America.

Dated at Genoa, this 19th day of July of 1920.

Soc. Esp. Agricola Ligure, by (Signature illegible.)

[fol. 174] Form No. 140

Consular Certificate

(Date:) Jul. 20, 1920.

I do hereby certify that the invoice described in the indorsement hereof was this day produced to me by the signer of the annexed declaration.

I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the prices given in the invoice agree with the actual market value or wholesale price of the merchandise described in the said invoice in

the principal markets of the country at the time of exportation, excepting as noted by me upon said invoice, or respecting which I shall make special communication to the proper authorities.

I further certify that a fee of $2.50 United States gold, equal to (Local currency) 50 lira, has been paid by affixing stamps to the duplicate copy of this document.

Witness my hand and seal of office the day and year aforesaid.

A. Boraguco, Vice Consul of the United States of America.

(Place and date:) Naples, this 27th day of July, 1920.

Invoice of Cherries in Brine purchased by Rheinstrom Bros. of New York (Cincinnati) from Societa Esportazione [fol. 175] Agricola Ligure, of Savona, to be shipped per New York S/S "Ansaldo S. Giorgio I°."

Marks, numbers, and quantities	Full description of goods	Price per unit	Total amount
R. B. Cincinnati B.	Eight hundred and forty-five barrels cherries in brine nett KG. 114075 a ..... (F. O. B. Naples)	0.16.5	18822 37

The above invoice is correct and true.

(Signature of purchaser or seller) Societa Esportazione Agricola Ligure, Savona. (Signature illegible.)

Custom House Indorsement

No. 10734

Importer: Rheinstrom Bros. Co.
Vessel: S/S Ansaldo S Giorgio.
Arrived: Aug. 23/20.
Kind of Entry: Free.

Marks, Quantity, and Contents	
R. B. Cincinnati B.	Eight hundred and forty five barrels cherries in brine brutt Kilos 202800

P. H. Petry Co.

[fol. 176] Consular officers will leave all of above indorsement blank. It is to be filled in only at the custom-house at the port of entry.

Purchased by Importer

Invoice of Food and Drug Products

Invoice No. 1503 issued in {Triplicate. / Quadruplicate.}

Certified 26 Lug. 1920.

American Consular Service

at Naples

Date: 26th day of July, 1920.
Seller: Società Esportazione Agricola Ligure.
Purchaser: Rheinstrom Bros.
Name of vessel or railroad: "Ansaldo S. Giorgio I°."
Port of shipment: Naples.
Port of arrival: New York.
Port of entry: New York.
Amount of invoice: $18822.37.
Kind of goods; Cherries in Brine.

Form No. 138

Declaration of Purchaser or Seller or Duly Authorized Agent of Either

I, Società Esportazione Agricola of Ligure Savona do solemnly and truly declare that I am the (Purchaser or [fol. 177] seller) seller of the merchandise in the within invoice mentioned and described; that the said invoice is in all respects correct and true, and was made at the place named therein whence the said merchandise is to be exported to the United States of America; that said invoice contains a true and full statement of the time when, the place where, and the person from whom the same was purchased, or agreed to be purchased, and the actual cost thereof, price actually paid or to be paid therefor; and all charges thereon; that no discounts or commissions are contained in said invoice but such as have been actually allowed thereon; that all drawbacks or bounties received or

to be received are shown therein; that no different invoice of the merchandise has been or will be furnished to anyone, and that the currency in which the invoice is made out is that which was actually paid or to be paid for the said merchandise.

I further declare that it is intended to make entry of said merchandise at the port of New York in the United States of America.

Dated at Naples, this 26th day of July, 1920.

Societa Esportazione Agricola Ligure, Savona
(Signature illegible).

[fol. 178] Form No. 140

Consular Certificate

(Date:) 26 Lug. 1920.

I do hereby certify that the invoice described in the indorsement hereof was this day produced to me by the signer of the annexed declaration.

I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the prices given in the invoice agree with the actual market value or wholesale price of the merchandise described in the said invoice in the principal markets of the country at the time of exportation, excepting as noted by me upon said invoice, or respecting which I shall make special communication to the proper authorities.

I further certify that a fee of $2.50 United States gold, equal to 50 has been paid by affixing stamps to the dupli-

(Local currency.)

cate copy of this document.

Witness my hand and seal of office the day and year aforesaid.

(Signature illegible), Consul of the United States of America.

(American Consular Service Fee Stamp.)

[fol. 179] LIBELLANT'S EXHIBIT 4A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

RHEINSTROM BROTHERS COMPANY, Libellant,

against

S. S. "ANSALDO SAN GIORGI I," SOCIETA NATIONALE DI NAVIGAZIONE, Claimant

It is hereby stipulated by and between the proctors for the respective parties hereto that the documents attached hereto are true copies of letters exchanged between counsel in this case on the dates indicated.

Dated New York, March 25, 1931.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Loomis & Ruebush, Proctors for Claimant.

[fol. 180] Exhibit 1, Annexed to Libellant's Exhibit 4A

18 April, 1921.

S. S. "Ansaldo San Giorgio I."
Our File No. 01931.

Messrs. Loomis, Barrett & Jones, 52 Broadway, New York City.

Attention of Mr. Loomis

DEAR SIRS:

Referring to telephone conversation had with Mr. Loughran of our office, we have a claim for $17,000 against this vessel on account of damage to three shipments of cherries in brine from Genoa and Naples, which arrived in August and September of last year. A portion of the shipment was consigned to and delivered at New York on August 19th and the remainder at Philadelphia on September 2nd. The Rheinstrom Bros. Co. of Cincinnati, Ohio, owned the goods.

As we are preparing a libel and understand that there is a possibility of your being authorized to appear and bond, we shall refrain from attaching one of the vessels

of this line if you will assure us that you will furnish the necessary bond.

Awaiting your advices, we remain

Very truly yours, —— ——.

RHL:TS.

[fol. 181] Exhibit 2, Annexed to Libellant's Exhibit 4A

Loomis, Barrett & Jones, Attorneys & Counsellors at Law, 52 Broadway, New York

Homer L. Loomis, Joseph A. Barrett, Stephen A. D. Jones.

April 21, 1921.

Re s/s Ansaldo San Giorgio I

Messrs. Harrington, Bigham & Englar.

Dear Sirs: Your letter of the 18th instant is at hand asking whether it will be necessary for you to have process of foreign attachment issued in this case in which you are now preparing a libel. We are writing to clients and hope to have advices enabling us to answer your query within the next few days.

Yours very truly, (Sgd.) Loomis, Barrett & Jones.

[fol. 182] Exhibit 3, Annexed to Libellant's Exhibit 4A

December 10, 1921.

S. S. "Ansaldo San Georgio I".
The Rheinstrom Bros. Co.
Our file No. 01931.

Messrs. Loomis & Jones, 52 Broadway, New York City.

Dear Sirs: We beg to refer you to our letter of April 18th and your reply of April 21st. Will you kindly let us hear from you in this matter, at your earliest convenience.

Yours very truly, —— ——.

AO:MAC.

[fol. 183] Exhibit 4, Annexed to Libellant's Exhibit 4A

Loomis & Jones, Attorneys at Law, 52 Broadway, New York

Homer T. Loomis, Stephen A. D. Jones, Esli L. Sutton.

December 13, 1921.

S. S. "Ansaldo San Giorgio I".

Rheinstrom Bros. Co.

Messrs. Harrington, Bigham & Englar.

DEAR SIR:: We have your letter of the 10th instant in the above matter, your file number 01931, and in response thereto beg to advise that in consideration of your refraining from attaching we will appear and furnish bond in an amount to be hereafter agreed upon or fixed by the court in the libel you are about to file against this ship.

Yours very truly, (Sgd.) Loomis & Jones.

[fol. 184] Exhibit 5, Annexed to Libellant's Exhibit 4A

May 18, 1922.

The Rheinstrom Bros. Co. v. S. S. Ansaldo San Giorgio I. Our file No 01931.

Messrs. Loomis & Jones, 52 Broadway, New York City.

DEAR SIRS: Will you kindly appear and file stipulation for value in the above action, without further delay.

Yours very truly, —— ——.

AO:MAC.

Exhibit 6, Annexed to Libellant's Exhibit 4A

November 2, 1922.

The Rheinstrom Bros. Co. v. S. S. Ansaldo San Giorgio I. Our file No 01931.

Messrs. Loomis & Jones, 52 Broadway, New York City.

DEAR SIRS: Will you kindly file your answer in the above case without further delay.

Yours very truly, —— ——.

AO:MAC.

[fol. 185] Exhibit 7, Annexed to Libellant's Exhibit 4A

Loomis & Jones, Attorneys at Law, 52 Broadway, New York

Homer L. Loomis, Stephen A. D. Jones, Esli L. Sutton, Reginald B. Williams.

November 3, 1922.

Rheinstrom Brothers v. S. S. Ansaldo San Giorgio I.

Messrs. Bigham, Englar & Jones.

Dear Sirs: Referring to your letter of the 2nd instant we desire to state that we are now in the process of preparing our answer and will serve you with a copy of the same in due course.

Yours very truly, (Sgd.) Loomis & Jones.

[fol. 186] Exhibit 8, Annexed to Libellant's Exhibit 4A

December 1, 1928.

S. S. "Ansaldo San Giorgio I".
Our file No. 01931.

Messrs. Loomis & Ruebush, 52 Broadway, New York City.

Dear Sirs: We should be glad to agree the damages in this case, if agreeable to you, to avoid further expense. Accordingly, we enclose a statement of these damages. We also enclose, for your information, a copy of Messrs. Koehler, Kemp & Koehler's survey report upon the basis of which the damages are figured. The other pertinent documents bearing on the loss, such as invoices, etc., are available to you in the record on appeal.

Yours very truly, —— ——.

K-4. Enclosures.

[fol. 187] Exhibit 9, Annexed to Libellant's Exhibit 4A

Loomis & Ruebush, Attorneys at Law, 52 Broadway, New York

Homer L. Loomis, Reginald B. Williams, Glenn W. Ruebush.

December 5, 1928.

Rheinstrom Brothers v. Ansaldo San Giorgio.

Messrs. Bigham, Englar & Jones.

Dear Sirs: We have your letter of the first instant together with its stated enclosures.

We are making a study of these documents and will discuss with you in due course the possibility of agreeing upon your provable damages.

In the meantime we remain,

Yours very truly, (Sgd.) Loomis & Ruebush.

[fol. 188] Exhibit 10, Annexed to Libellant's Exhibit 4A

January 8, 1929.

The Rheinstrom Bros. Co. v. S. S. Ansaldo San Giorgio I.
Our File No 01931.

Messrs. Loomis & Ruebush, 52 Broadway, New York City.

Dear Sirs: We beg to refer you to our letter of December 1st and your reply of December 5th, and should be glad to know if you have reached any conclusion.

Very truly yours, —— ——.

L-2.

[fol. 189] Exhibit 11, Annexed to Libellant's Exhibit 4A

Loomis & Ruebush, Attorneys at Law,

52 Broadway, New York

Homer L. Loomis, Reginald B. Williams, Glenn W. Ruebush.

January 10, 1929.

Rheinstrom Brothers Co. v. s/s Ansaldo San Giorgio I.

Messrs. Bigham, Englar & Jones.

Dear Sirs:

We have your letter of the 8th instant. We have studied the enclosures of your letter of December 1st last and note that the surveyors in making their estimates of the percentage of damage in each case used 5 percentages or multiples of 5 percentages. Accordingly, we assume that their estimates were only general estimates and were undoubtedly most favorable to the consignee.

Furthermore, in arriving at your damages you have apparently assumed that the barrels and casks in question were full of cherries and that the cherries were in good condition at the time they were delivered to the carrier. We have no way of knowing how many pounds of cherries the barrels in question contained, or ideed that they contained any cherries at all for that matter, for presumably barrels full of liquid would weigh as much as barrels full of cherries. Furthermore there seems to us to be grave doubt [fol. 190] that the cherries were in good condition at the time they were shipped. Indeed we should imagine that in many instances they were not.

However, in order to avoid any further expenses in connection with this case we should be willing to recommend to our client that it pay a reasonable amount in settlement of this case. What would you say to a settlement in the sum of $10,000 flat?

Waiting to hear from you further in the premises, we are

Yours very truly, (Sgd.) Loomis & Ruebush.

Exhibit 12, Annexed to Libellant's Exhibit 4A

January 30, 1929.

Rheinstrom Bros. Co. v. S. S. Ansaldo San Giorgio I.

(Our file No. 01931.)

Messrs. Loomis & Ruebush, 52 Broadway, New York City.

DEAR SIRS:

Referring to your letter of the 10th instant, we beg to advise you that we have submitted the question of settling for $10,000 to our clients. Our clients have declined to entertain settlement on such a basis and we are accordingly going ahead with our proof of damages. We enclose here- [fol. 191] with an order for a commission directed to the American Consul at Rome, to take the testimony of August Kiefer and Umberto Gasperini, which we shall be obliged if you will consent to.

Yours very truly, —— ——.

L-2. Enclosure.

Exhibit 13, Annexed to Libellant's Exhibit 4A

Loomis & Ruebush, Attorneys at Law,

52 Broadway, New York

Homer L. Loomis, Reginald B. Williams, Glenn W. Ruebush.

January 31, 1929.

Rheinstrom Brothers Co. v. S/S Ansaldo San Giorgio I.

Messrs. Bigham, Englar, Jones & Houston.

DEAR SIRS:

We hereby acknowledge the receipt of your letter of the 30th instant, together with its stated enclosure.

We also confirm the telephone conversation had between our Mr. Loomis and your Mr. Houston of the 30th instant.

We understand that the proposed order for the commis- [fol. 192] sion is to be held in abeyance pending further settlement negotiations.

Yours very truly, (Sgd.) Loomis & Ruebush.

Exhibit 14, Annexed to Libellant's Exhibit 4A

February 18, 1929.

The Rheinstrom Brothers Co. v. S. S. Ansaldo San Giorgio I.

(Our file No. 01931.)

Messrs. Loomis & Ruebush, 52 Broadway, New York City.

Attention of Mr. Ruebush

DEAR SIRS:

Confirming our Mr. Ogden's telephone conversation with you of this afternoon, we beg to advise you that we are obliged to insist that your cross-interrogatories addressed to August Kiefer and Umberto Gasperini be filed and served upon us on or before February 25th, as provided by the order for the commission. This letter will formally notify you that we are not prepared to grant any extensions in the matter.

Very truly yours, —— ——.

[fol. 193] Exhibit 15, Annexed to Libellant's Exhibit 4A

June 19, 1930.

Rheinstrom Bros. & Co. v. SS. Ansaldo San Giorgio I.

(Our file No. 01931.)

Messrs. Loomis & Ruebush, 165 Broadway, New York City.

DEAR SIRS:

We enclose herewith in question and answer form the interrogatories and cross-interrogatories propounded to August Kiefer and Umberto Gasperini, together with the answers of the witnesses.

Very truly yours, —— ——.

L-4. Enclosures.

[fol. 194] Exhibit 16, Annexed to Libellant's Exhibit 4A

Loomis & Ruebush, Attorneys at Law,

165 Broadway, New York

Homer L. Loomis, Reginald B. Williams, Glenn W. Ruebush.

June 21, 1930.

5370 Rheinstrom v. Ansaldo.

Messrs. Bigham, Englar, Jones & Houston.

DEAR SIRS:

We have your letter of the 19th instant together with its stated enclosure for which we thank you.

Yours very truly, (Sgd.) Loomis & Ruebush.

[fol. 195] Exhibit 17, Annexed to Libellant's Exhibit 4A

October 22, 1930.

S. S. "Ansaldo San Giorgio I."
The Rheinstrom Bros. Co.
(Our file No. 01931.)

Messrs. Loomis & Ruebush, 165 Broadway, New York City.

DEAR SIRS:

We confirm, at your request, having adjourned the examination of Mr. Johnson, of San Francisco, from October 24th to November 12th, at the same time and place.

Very truly yours, —— ——.

B-3.

[fol. 196] LIBELLANT'S EXHIBIT 5

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

82-357

THE RHEINSTROM BROTHERS CO., Libellant,

against

THE S. S. "ANSALDO SAN GIORGIO I," her engines, boilers, etc., SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant

SIRS:

Please take notice that upon the pleadings herein, the libellant will move this Court at a Stated Term for the hearing of motions to be held in the Court Rooms thereof in the Post Office Building, Borough of Manhattan, Southern District of New York, on the 6th day of October, 1931, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard for an order allowing the libellant to propound the following interrogatories to the claimant of the above-named vessel, to be answered by it in writing and under oath:

First Interrogatory: Examine the attached document marked Exhibit "A", being a photostatic copy of an original letter on the printed letterhead of the Societa Nazionale di Navigazione, the claimant, addressed to Rheinstrom [fol. 197] Bros. Co., the libellant in this case, and state whether or not the original letter was sent to the libellant by the claimant.

Second Interrogatory: Examine the attached copies of telegram and letters marked Exhibits "B", "C", "D" and "E", respectively, and state whether the originals of all or any one of said copies were received by the claimant, the Societa Nazionale di Navigazione or its representatives.

Third Interrogatory: Did the claimant receive the copy of letter from Koehler, Kemp & Koehler addressed to the

libellant which is referred to in Exhibit "C". If so, attach a copy of same to the answers hereto.

Dated, New York City, Sept. 30, 1931.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Libellant, Office & P. O. Address, No. 64 Wall Street, New York City.

To Loomis, Williams & Donohue, Esqs., Proctors for Claimant, No. 165 Broadway, New York City.

[fol. 198] Exhibit A, Annexed to Libellant's Exhibit 5

Societa Nazionale di Navigazione, Genova

139 South Third Street,
Philadelphia, Oct. 15, 1920.

S. S. "Ansaldo San Giorgio I"

The Rheinstrom Bros. Co., Cincinnati, Ohio.

GENTLEMEN:

We are still holding on Pier 40 about one hundred and fifty (150) barrels from your consignment on the S. S. "Ansaldo San Giorgio I".

Some of these barrels are half full of decayed matter and the Board of Health has requested immediate disposal.

Unless we receive your orders relative to the disposition of these barrels, we will be compelled to have same removed for your account.

Yours very truly, Societa Nazionale di Navigazione,
Per D. Maggi, G.

FLG/EF.

Received Oct. 18, 1920.
Ans'd.
Ent'd.

[fol. 199] Exhibit B, Annexed to Libellant's Exhibit 5

F 7 Ax ra 1247p— 19
Po Phila Pa Oct 20—
Rheinstrom Bros. Co.
Cinti O.

Advise immediately disposition of barrels board of health will remove for your account and expense with twenty four hours.

Societa Nazional Nav.

Received Oct. 20, 1920.
Ans'd.
Ent'd.

[fol. 200] Exhibit C, Annexed to Libellant's Exhibit 5

Societa Nazionale di Navigazione, 80 Maiden Lane, New York City.

GENTLEMEN:

We are just in receipt of advices from our representative, Mr. Clifford W. Kramer, that the shipment of Cherries ex S/S "Ansaldo San Georgia I", has been discharged in a badly damaged condition.

We hereby notify you that we will enter claim for loss sustained by us and enclose herewith copy of letter received from Messrs. Koehler, Kemp and Koehler, surveyors and appraisers, who have been called upon to appraise the damage to this shipment.

We request that you give us an explanation of your company's negligence and if your representatives have not seen the damage to this shipment, we suggest that they do so immediately.

Very truly yours, The Rheinstrom Bros. Co.

August Thirty-first
Nineteen-Twenty.
F F'R.

[fol. 201] Exhibit D, Annexed to Libellant's Exhibit 5

Societa Nazionale di Navigatione, #80 Maiden Lane, New York City.

GENTLEMEN:

In re Cherries in Brine
Ex S/S "Ansaldo San Giorgio I".

Please take notice that our shipment of 845 casks of Cherries in Brine, ex above steamer arriving in New York about August 31st, 1920, was delivered short 45 casks, and we hereby make claim for same on the S/S "Ansaldo San Giorgia I," her owners and charterers. B/L calls for 845 casks, and you only delivered 809 casks.

As advised you under date of August 31st, there was also considerable damage to this shipment, for which we intend

to file claim, and we will advise you of the amount as soon as ascertained.

Please acknowledge receipt of this communication, and oblige,

Very truly yours, The Rheinstrom Bros. Co.

October Second,
Nineteen-Twenty.
J. E'R.

[fol. 202] Exhibit E, Annexed to Libellant's Exhibit 5

Societa Nazionale di Navazione, 139 South Third St., Philadelphia, Pa.

(Registered)

GENTLEMEN:

There is a loss to our cargo of 3421 barrels of Cherries in Brine, ex S/S "San Giorgio I," from Naples arriving Philadelphia about September 1st, and we hereby make claim for the same on the S/S "San Giorgio I," her owners and charterers.

The amount of the loss has not as yet been ascertained, but when determined, we will advise you further.

The Rheinstrom Bros. Co.

September Twenty-second,
Nineteen-Twenty.
JE—K.

P. S. The cargo consists of two (2) lots—one of 466 barrels, and one of 2,955 barrels.

[fol. 203] Answers of Claimant, Annexed to Libellant's Exhibit 5

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

82-357

RHEINSTROM BROS. COMPANY, Libellant,

against

S/S "ANSALDO SAN GIORGIO I," SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant

Answers of the claimant, Societa Nazionale di Navigazione, to the interrogatories of libellant, Rheinstrom Bros.

Company, given on information and belief and to the extent that the investigation thus far made by the claimant permits.

To the First Interrogatory: Yes.

To the Second Interrogatory: No, except as to Exhibit D which was received by the claimant.

To the Third Interrogatory: No.

Societa Nazionale di Navigazione, Claimant, by Dominie A. Truda, as Agent.

[fol. 204] STATE OF NEW YORK,
County of New York, ss:

Dominic A. Truda, being duly sworn, deposes and says that he is agent for the claimant herein; that he has read the foregoing answers and knows the contents thereof and that the same are true of his own knowledge except as therein stated to be alleged upon information and belief and that as to those matters he believes it to be true; that the reason this verification is made by deponent is that claimant is a foreign corporation, none of whose officers is within this jurisdiction and that deponent is an officer of its agent and authorized to make this verification; that the sources of deponent's information and the grounds of his belief as to all matters not stated in the said answers to be alleged upon his own knowledge are reports made to him by employees and records of said corporation.

Dominic A. Truda.

Sworn to before me this 1st day of December, 1931. P. I. Brunato, Notary Public. Kings Co. No. 299, Reg. No. 2357. Cert. filed in N. Y. Co. No. 950, Reg. No. 23646. Commission Expires March 30, 1932. (Notarial Seal.)

[fol. 205] LIBELLANT'S EXHIBIT 6

Translation furnished by Carl Geller, 9– Broad Street. Tel. Bowling Green 9-5514. For Messrs. Bigham, Englar, Jones & Houston. Vessel S/S Ansaldo San Giorgio I.

(Translation of Invoices)

Chisetti Astonio & Cia

Exportation Fresh Fruit.
Importation Dried Fruit and Vegetables.

Modena, Italy, July 5, 1920.

Invoice No. 167-177

Messrs. The Rheinstrom Brothers & Co., Cincinnati (Ohio).

For packages loaded in steamer Ansaldo San Giorgio I with direct bill of lading to Philadelphia.

Sulphurated Duroni Cherries in Brine

Packages	Quality of merchandise			Weight in kilogr.	Price per 100 kg. delivered Modena	Amount
	First Choice					
U. G. 21 barrels....	235	5	230	4830		
222	185	3	182	40404		
15	150	3	147	2205		
121	36	1	35	4235		
				51674	2.65	136936.10
[fol. 206]	Second Choice					
II 8 barrels...	185	3	182	1456		
79	36	1	35	2765		
				4221	1.50	6331.50
	Revenue stamp.....					.50
	Lire Ital.....					143268.10

Italian Lire One hundred and forty-three thousand two hundred and sixty-eight with 10 centesimi.

Societa Esportazione Agricola Ligure, Savona (Italy)

Savona, July 26, 1920.

Messrs. Rheinstrom Bros., Cincinnati.

We have pleasure in handing you invoice for what you have ordered of us by contract and shipped to you to-day

per SS Ansaldo S. G. I for the amount of which you will credit us with $19085.10 payment on presentation of documents B. S. S.

Always at your service, we are

Yours very truly, —— ——.

Mark or number	Kilograms	Packages	Quality	Price	Total
R. B. Cincinnati	48000			$16.50	7920.00
	63540	845	Cherries in brine	$16.50	10166.40
					18086.40

[fol. 207]

Deducted as per contract 5%	904.30
	17,182.10
Freight to be reimbursed to us	1,903.00
Amount	$19,085.10

Merchandise delivered fob. Naples.
Insurance to be borne by purchaser.
Barrels net weight fruit 132 kg. each.

Societa Esportazione Agricola Ligure, Savona (Italy)

Savona, July 17, 1920.

Messrs The Rheinstrom Brothers Company, Cincinnati, Ohio.

We have pleasure in handing you invoice for what you have ordered of us by contract and shipped to you to-day per SS Ansaldo S. G. I, for the amount of which you will credit us with $66,445.98 payment on presentation of documents.

Always at you service, we are

Yours very truly, —— ——.

Mark or Number	Kilograms	Packages	Quality	Price	Total
R. B. M. o.	103060	792	Cherries in brine at 130 kg. each barrel net weight fruit	$16.50	16988.40
R. B. V.	31680	240	Cherries in brine at 132 kg each barrel net weight fruit	$16.50	5227.20

[fol. 208]

Mark or Number	Kilograms	Packages	Quality	Price	Total
R. B. S.	248456	1883	Cherries in brine at 130 kg. each barrel net weight fruit	$16.50	41011.74
R. B. M. o.		40	Cherries rejections per barrel	$10.00	400.00
					$63627.34
			Deducted 5% until verification weight		3181.36
					$60445.98
			Amount of freight paid by us to SS. Merchandise sold fob. Genoa.		6000.00
			Total		$66445.98

[fol. 209] LIBELLANT'S EXHIBIT 7

Dates of Docket Entries in This Case Appearing in Libellant's Exhibit 3, Supplemented by Additional Docket Entries, Including Dates of Proceedings Before Special Commissioner

1920

Aug. 19. Date of arrival of the New York shipment on the S. S. "Ansaldo San Giorgio".

Sept. 2. Date of arrival of the S. S. "Ansaldo San Giorgio" at Philadelphia.

1922

Mar. 1. Libel filed.

Nov. 13. Answer filed.

Nov. 14. Note of issue and notice of trial served and filed.

1925

July 16. Libellant's order for closed commission to Naples.

Aug. 1. Claimant's order for closed commissions to Naples and Genoa.

Oct. 26. The three above commissions issued and forwarded to Italy.

Dec. 17. Claimant's executed commission returned from Naples and filed.

1926

May 6. Claimant's executed commission returned from Genoa and filed.

1927

Oct. 4 and 5 Case tried in the District Court.
Oct. 10. Decision rendered for libellant.
Oct. 20. Interlocutory decree filed.

[fol. 210]

Nov. 9. Notice of appeal filed and allowed and assignments of error filed.
Nov. 15. Filed order extending claimant's time to file record on appeal to December 20, 1927.

1927

Dec. 21. Filed order extending claimant's time to file record on appeal to January 21, 1928.

1928

Jan. 10. Filed order extending claimant's time to file record on appeal to January 31, 1928.
July 2. Decision of District Court affirmed per curiam; no opinion.
Oct. 22. Claimant's petition of certiorari to U. S. Supreme Court denied.

1929

Feb. 13. Order for libellant's commission to Rome.
" 28. Cross interrogatories filed.
Mar. 5. Commission issued to take the testimony of libellant's witnesses, August Kieffer and Umberto Gasperini, at Rome Italy.
May 7. Depositions returned by the American Consul and filed in the United States District Court.

1930

Oct. 11. Served notice of taking deposition of R. G. Johnson of San Francisco.
Nov. 28. Deposition returned and filed.
Dec. 23. Hearing before Commissioner.

1931

Mar. 27. Libellant's brief filed.
May Claimant's brief served and filed.

[fol. 211]

May 21. Libellant's reply brief filed.
Aug. 14. Claimant's reply brief filed.
" 24. Libellant's supplemental brief filed.
Sept. 12. Claimant's supplemental reply brief filed.
" 25. Served notice of application for reopening hearing.
" 28. Hearing and motion granted.

1931

Oct. 1. Served notice of motion for order to serve interrogatories on claimant.

" 6. Argument before Judge Bondy. Briefs thereafter exchanged and filed.

Oct. 26. Court filed opinion granting libellant's motion. Order on said motion signed and served on claimant.

Dec. 7. Hearing before Commissioner.

" 8. Claimant served and filed answers to interrogatories under oath.

1932

Jan. 8. Hearing before Commissioner.

" 26. Hearing before Commissioner. Libellant rests.

" Application by claimant for permission to take testimony in Cincinnati. Granted.

Feb. 5. Claimant's depositions taken at Cincinnati.

Mar. 2. Libellant's brief filed.

" 21. Depositions filed with Commissioner and leave granted to file additional briefs by April 4.

Oct. 17. Report of Commissioner filed.

Dec. 21. Served libellant's motion to overrule claimant's exceptions.

" 27. Libellant consented to claimant's application to adjourn argument of motion to Jan. 3, 1933.

[fol. 212] CLAIMANT'S EXHIBIT A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE RHEINSTROM BROTHERS COMPANY, Libellant,

against

S. S. "ANSALDO SAN GEORGIO I," SOCIETÀ NAZIONALE DI NAVIGAZIONE, Claimant

Depositions of James A. Rheinstrom and R. Kramer, taken before Allen C. Roudebush, a Notary Public, within and for the County of Hamilton in the State of Ohio, at the office of Rheinstrom Brothers Company in Cincinnati, Ohio, on Friday, February 5th, 1932, to be read in evidence on behalf of the claimants in the above entitled action.

Appearances:

Bigham, Englar & Jones, and F. H. Prem, Proctors for Libellant.

Loomis & Ruebush, and Phillip A. Donahue, 165 Broadway, New York, Proctors for Claimant.

It is hereby stipulated and agreed between counsel, that certification, filing and signing is waived. Stenographer costs to be taxable.

[fol. 213] JAMES A. RHEINSTROM, being first duly sworn, testified as follows:

Examination.

By Mr. Donahue:

Q. What is your position with the company, Mr. Rheinstrom?

A. President.

Q. What was your position in August and September, 1920?

A. The same position.

Q. Are you familiar with the shipment of 2955 barrels of cherries and brine, another shipment of 466 casks of cherries and brine and a third shipment of 845 barrels of cherries and brine, shipped from Italy on board the steamship "Ansaldo San Georgio I", in July 1920, arriving in New York the latter part of August, 1920 and in Philadelphia in September, 1920?

A. I recall they arrived on those dates.

Q. What was done with these cherries after their delivery to you in New York and Philadelphia? Were they brought on here to Cincinnati?

A. They were loaded of course and brought to Cincinnati.

Q. All of them?

A. All that were accepted.

Q. Well now will you produce your records showing what disposition was made of these cherries?

A. You mean after they arrived at the factory? We keep no record of every barrel received at the plant. Every one of these barrels were pitted as our requirements demanded. It takes about a year to pit a whole crop of

cherries. As we needed them we pitted them but we kept no individual record of the barrels.

Q. What do you mean by pitting?

A. The stems removed and the pits removed.

Q. Well we will take the specific lots. What was done with the consignment of 845 barrels of Cherries and Brine [fol. 214] that were delivered from the steamer?

A. They were stored in a warehouse and as I said, as we needed them we pitted them along with other cherries we had in the warehouse.

Q. And the same thing happened with the other two lots, that is the lot of 2955 barrels and the lot of 466 casks?

A. Yes, all of the shipments that came in were stored in our warehouse and as we needed them we pitted them.

Q. And when was the last of the cherries used?

A. As I said before, it required a year to consume all of the cherries that were brought in from any one crop. By the time the new crop was available the old crop should be consumed.

Q. What use was made of the cherries after they were put through a process? Would you describe the process?

A. The cherries are first pitted and then washed, colored and processed in syrup, flavored and either put in bottles, or barrels or candied.

Q. Is the cherry given a name after the process is completed?

A. Well it is known as a maraschino cherry.

Q. In that process is there ever any loss of cherries as a result of selection or sorting?

A. During the pitting operation the girls grade the cherries as to size and quality, separating the whole fruit and the broken and also separating the sizes.

Q. I understand they are separated as to whole and broken and separated as to sizes. Are they separated as to condition?

A. Well the separating as to whole or broken would take care of any that are inferior. They would go into the broken.

Q. Are they separated by condition? I mean by that, condition of decay or deterioration?

[fol. 215] A. Yes, any that are shriveled would go into the broken and any that are whole would be used as such.

Q. When a cherry is shriveled can it still be used?

A. It can be used as broken.

Q. When does a cherry become shriveled? Or if you will allow me, what are the causes that create this condition of shriveling?

A. Loss of brine.

Q. So that if brine leaked out of the barrel in which the cherries are contained, the result would be that the cherries would shrivel? That would be the effect?

A. Yes, and the amount of brine leaking out would be responsible for the proportion of deterioration or shriveling that would take place. If all the brine leaks out and remains out for a period of days all the fruit would shrivel.

Q. But the fact that the fruit was shriveled as you say, would it prevent its being processed and being used?

A. Of course if the brine has been out for a number of days and the fruit is decomposed, it would be of no value at all and it would have to be thrown away.

Q. Well roughly, how long a time would it take for deterioration to set in after the loss of brine?

A. I would say that if the brine is out of the barrel for a total of seven to ten days that the fruit would then be practically worthless.

Q. Now if some of the brine is lost out of the barrel of cherries—let us say ten per cent of the brine leaks out, would that necessarily cause any damage to the cherries?

A. The cherries that are submerged in the other ninety per cent of the brine would be in good condition and those above that mark would all shrivel.

Q. They would be shriveled?

A. Yes, and if they are dry long enough they would be- [fol. 216] come worthless, but if they were not dry too long they would have a value to them.

Q. But the fact that the cherry is shriveled does not mean that its value is lost, is that right?

A. It has a value as a broken fruit which is sold at a considerably lower price and often at a loss.

Q. You mean by a loss—if the cherry was purchased as a sound cherry and then as a result of loss of brine became shriveled, it might have to be sold at a price less than you would have gotten had the cherry been sound?

A. That is correct.

Q. Do you recall whether in the three lots in question any of the cherries were shriveled?

A. Yes, they were.

Q. Do you remember or have you any way of refreshing your memory as to the approximate quantity that were shriveled?

A. I just remember that there were a tremendous lot of shriveled cherries but I cannot remember the exact proportion. That was about twelve years ago.

Q. Do you have any records that would show the quantity of these cherries that were shriveled?

A. Only the record that was made by the surveyor.

Q. Do you have any records in your possession now or in the possession of your firm or company which show the quantity that were shriveled?

A. The only record would be a copy of the surveyor's report.

Q. Assuming then that the survey stated that in the 845 barrel lot eleven barrels were damaged 10%. Do you take that to mean that 10% of the cherries in each of the eleven barrels were shriveled?

A. That would mean that if the value of the barrel in prime condition was $20.00 for same, that after the shriveling, you would deduct 10% making the value then $18.00. [fol. 217] That the cherries that were left were worth $18.00 instead of $20.00.

Q. But it does not mean that ten per cent of the cherries in that barrel were shriveled?

A. No, it does not mean that ten per cent were shriveled, it means that the value of those left in the barrel is ten per cent less.

Q. Because of those shriveled cherries?

A. Because of the damage done in transit.

Q. But the cherries in those barrels that were shriveled could nevertheless be used by you?

A. Yes, they were used as broken cherries.

Q. And they were used in this instance?

A. Any that were shriveled were used as broken and any that were prime were used as whole.

Q. Have you any records, papers, documents or memorandum or any sort here in your possession or in the possession of Rheinstrom Bros. Co. that will show the exact disposition that was made of these three consignments of cherries?

A. We haven't any record other than to show that the barrels were received and as was customary, the contents

of every barrel was pitted in the course of requirements of business for the season.

Cross-examination.

By Mr. Prem:

Q. When these three shipments of damaged cherries were received at your factory, as I understand, they were placed in a warehouse together with other shipments you previously received and as the requirements of your business would make demand upon you, you would withdraw from the warehouse various barrels of cherries to be taken into your sorting room?

A. They were stored in two warehouses to be exact.

Q. Was any effort made to sort shipments as a unit [fol. 218] and dispose of them as a unit or were they commingled with other shipments?

A. The barrels that arrived in good shape would be commingled with other deliveries of prime cherries and those that were shriveled would be commingled with ones that were shriveled but they would be used during the season as our requirements demanded regardless of the particular lot in which the fruit arrived.

Q. Will you please describe what is done with a barrel of cherries when it is withdrawn from the warehouse and taken to the sorting room in the factory?

A. The head is removed, the fruit is taken out in basins and placed on the pitting table, every girl receiving one or two basins, and then pit the cherries and grade according to quality and size, separating the whole fruit from the broken. After that they are washed, colored and flavored in syrup.

Q. How many girls did you have employed in your sorting room at the time these shipments were processed?

A. We had from 150 to 200 girls pitting.

Q. As I understand it, the shriveled cherries in each barrel, regardless whether they were from the three shipments in question or from shipments received prior thereto, after they were given to the girls, the shriveled cherries in any of those lots were all placed in one container without an effort to segregate them as to lots?

A. You mean after they were pitted?

Q. Yes.

A. Well, all broken cherries would be placed in a barrel regardless of the lot from which they came.

Q. After the cherries were placed in bottles for disposition to your customers, is there any method by which [fol. 219] you could state which of the containers ready for sale, contained the cherries from the three shipments in question?

A. That would be impossible.

Q. As a result of the method which you describe for preparing cherries for sale, is this the reason you have no record to show the ultimate disposition of these three shipments in question.

A. Yes.

Redirect examination.

By Mr. Donahue:

Q. Do I understand you have no record at all, Mr. Rheinstrom?

A. No other than I have already mentioned.

R. KRAMER, witness called on behalf of claimant being first duly sworn, testified as follows:

Direct examination.

By Mr. Donahue:

Q. Do you have any records Mr. Kramer showing whether you made a profit or suffered a loss on this shipment, that is to say, any records which would show whether you received more or less than the invoiced price?

A. This would come under Mr. Rheinstrom's jurisdiction and I would have no authority in stating whether there was a profit or loss.

Q. Do you have any records under your control that show exactly what was done with these three consignments of cherries?

A. I have no records.

Q. Did you have anything to do with these cherries after they arrived at the premises here in Cincinnati?

A. Nothing.

Q. Do you agree with Mr. Rheinstrom that cherries can [fol. 220] never be used after they are shriveled?

A. I agree in so far that they can only be used as broken cherries.

Q. What is the use to which broken cherries are put?

A. Broken cherries are sold principally to ice cream manufacturers.

Q. And for what purpose are they used by ice cream manufacturers, if you know?

A. Well, I suppose mixed with ice cream.

Q. Broken cherries have a ready market as such, do they not?

A. I would not say a ready market.

Q. What I mean by a ready market is that there are manufacturers or others who have need and use for broken cherries. Such as the ice cream manufacturers that you mention.

A. Yes there is, but the price for broken cherries would be considerably under the whole cherry price.

Q. Some of the cherries in the three lots were broken cherries and were purchased by your company as broken cherries, isn't that true?

A. I would have to look in the records.

(Mr. Donahue: I think one of the exhibits shows that. Here it is Exhibit No. 7 page 153 of the records in this case.)

(Witness reads exhibit.)

Witness: Does that mean second quality there (indicating)?

Mr. Donahue: Yes (shows him translation of exhibit).

Witness: They had a mark on the head to distinguish the difference.

Mr. Donahue: What had a mark on the head?

Witness: If there were any broken cherries in the lot the heads were marked accordingly.

[fol. 221] Cross-examination.

By Mr. Prem:

Q. Your connection with this shipment was when it arrived at New York, you were present at the dock to receive it?

A. Yes.

Q. What else did you have to do with this shipment?

A. Well to see that any damaged barrels were put in good condition, that is, the barrels had to be recoopered to hold water. The barrels were filled with water.

Q. Were you present with Mr. Johnson all the time he surveyed these cherries?

A. I was with him all the time.

Q. Did Mr. Johnston's method of surveying these cherries differ from any other survey?

(Mr. Donahue: I object as to whether it did or not.)

A. No we had no survey made and the method was the same.

Q. Did you agree with Mr. Johnston as to the extent of the damage?

(Mr. Donahue: I object to the question as immaterial.)

A. Several times we had an argument as to the extent of the damage.

Q. What was the nature of this discussion?

(Mr. Donahue: Note my objection.)

A. Well at times I felt that the damage was more than the percentage he decided on. Sometimes he would object and other times he would agree with me if the damage was as great as I would say it was.

[fol. 222] Q. Based on your experience in examining damaged cherries, what would you say as to the correctness of Mr. Johnston's decision as to the extent of the depreciation?

A. I think Mr. Johnston was generally fair in his examinations.

Q. And estimates?

A. And estimates, yes.

Q. Were you also present at Philadelphia while the cherries were at the Steamship Company's docks there?

A. I was present as the New York shipment was completed. I went down to take care of the Philadelphia lot.

Q. Where was that lot reconditioned?

A. I think it was Pier 40.

Q. It was on the dock where they were discharged?

A. It was already discharged when I got there.

Q. Were they removed from the dock before they were reconditioned?

A. No they were reconditioned right on the dock.

Q. What period of time would that consume?

A. Two weeks.

Q. Were any of the representatives of the Steamship Company in the vicinity during that time?

(Mr. Donahue: Objection on the ground that the witness' knowledge of connection of anybody there with the steamship company is not shown.)

A. The delivery clerk.

(Mr. Donahue: Objection withdrawn.)

Q. He was the Delivery Clerk of the Steamship Company that delivered these cherries to the dock?

A. Yes.

[fol. 223] (Mr. Donahue: Objection to that characterization "Delivery Clerk" as being only the characterization and no identification of the person shown.)

Q. Do you know the Delivery Clerk's name?

A. It is an Italian name. I would have to think about that. Could I look at the records to make sure? (Witness looks up records.) Balletta is the name of the Delivery Clerk. It was Pier 40.

Q. I understand you employed one of his relatives to assist you in this work, is that true?

A. I had his son fill barrels with water after five o'clock in the evening.

Q. These second selection choice cherries that you referred to a moment ago were they also known as "culls"?

A. I never heard them called that.

Q. What is the nature of the condition which gives them the designation of second choice?

A. I would not call them even broken cherries, they would be more spotted cherries that could not be used for first class cherries.

Q. Is there anything wrong with the quality of fruit of this cherry?

A. They are often very much spotted.

Q. It goes to their appearance, they are not deteriorated?

A. No they are not deteriorated.

Q. The second choice fruit would not be fruit that had become deteriorated?

A. Not deteriorated, only spotted or having a brownish cast.

Redirect examination.

By Mr. Donahue:

Q. What is the spot caused by?

A. I think by the sun.

Q. Doesn't the spot have to be cut out before it is used? [fol. 224] A. They were generally mixed in with the broken cherries.

Q. There is no doubt about it that the spotted cherries have not the commercial value of the sound cherries?

A. No doubt.

Q. Before cherries are purchased they should be sorted out as to good and bad fruit. By that I mean no bad fruit should be left in with the good fruit. No doubt about that is there?

A. No.

Q. Isn't it true Mr. Kramer that before a lot of cherries are shipped from abroad they should be properly sorted out?

A. Yes that is true.

Q. And you agree Mr. Kramer that shriveled cherries can be put to the same uses that broken cherries are put?

A. Yes that is all they can be used for.

Q. So that the shriveled cherries in this lot if there were any were undoubtedly put to some use by your company?

A. Well they could only be used as broken or crushed cherries.

Q. They were undoubtedly used for that purpose in this instance?

A. They could not be used for anything else.

Q. They were not just thrown out, they were used?

A. The ones that I forwarded to Cincinnati were used, but the ones that were left on the dock were sent to the dump as far as I know.

Q. Do you know what quantity were left on the dock?

A. No I do not recall, I would have to consult the records.

Q. Do you have any records that you could consult?

A. What records we already referred to. I don't know whether I have any record or not. We left a certain number of barrels at the pier at Philadelphia.

Q. About fifty barrels?

A. I could not say.

[fol. 225] Q. Could you approximately say it was more than five barrels?

A. Yes.

Q. As much as ten barrels?

A. Yes.

Q. As many as fifteen?

A. Yes.

Q. As many as twenty?

A. I don't remember.

Q. Are you satisfied with Mr. Johnston's finding? Did you finally agree with him that he fairly represented the loss?

A. Yes.

Q. Isn't it true Mr. Kramer that after the cherries had been put through the process here that the damage for depreciation, in any particular reference to any particular barrel, might have been less than you had supposed it to be?

A. No I don't think so.

Recross-examination.

By Mr. Prem:

Q. How did Mr. Johnston examine this fruit?

A. The barrels were all lined up with the bungs out.

Witness JAMES A. RHEINSTROM recalled:

Direct examination.

By Mr. Donahue:

Q. Do you have any record Mr. Rheinstrom that would show exactly what amount of money you received for these three consignments of cherries? That is to say after they had been processed?

A. No they just went into our general sales.

Q. So that you do not know then whether you profited or lost on this consignment?

A. No I would not have any way of knowing.

Cross-examination.

By Mr. Prem:

Q. Mr. Rheinstrom you know the market value of these cherries when in prime condition. Did they sell at the same [fol. 226] price as prime cherries would sell and did the cherries in their broken condition sell at the same price cherries in their broken condition would sell for?

A. Well, the shriveled cherries are sold as broken and the prime cherries are sold as whole cherries.

Q. Well isn't it a fact then that you did not receive the whole value for this shipment?

A. Well they were sold during a certain year and the sales went into our volume for that particular year. Broken cherries were sold as broken and prime cherries were sold as prime cherries. But if all of these cherries were prime cherries our sales would have been greater.

Q. Because they became broken, did you stand a loss on these shipments?

A. The volume of our sales was diminished on that account.

Mr. Donahue: Have you any way of showing what the loss was?

A. The loss of our sales? It probably could be computed but that would be a rather technical thing to do.

Q. It could be done but it would be with difficulty?

A. Yes.

Mr. Prem: But could it be done at all because of the co-mingling of shipments?

(Mr. Donahue: I object to that. Mr. Rheinstrom stated that it could have been.)

A. It could be done but it would be almost impossible. There are some things almost impossible to do and that is one of them.

Q. Was that because the shipments were co-mingled?

A. Well that would make it almost impossible.

[fol. 227] Q. It would be necessary to trace every barrel through its various stages of processing and placing in containers and ultimate sale?

A. Yes, but the figure you would arrive at would only be an estimate.

Q. Well could it be possible to trace the shipments through your books at this time?

(Mr. Donahue: I object to the question.)

A. Well I would say it is practically impossible. That is about 99½% impossible.

Q. Did you accept Mr. Johnson's estimate as to the extent of loss in this shipment?

(Mr. Donahue: I object, the question is misleading.)

A. Yes.

By Mr. Donahue:

Q. Mr. Rheinstrom, assuming that the barrel of cherries was said to be depreciated 75%. Now isn't it true that if those cherries in that barrel were reconditioned that it might be found that some of the cherries could be used with broken cherries and that the loss therefore would not total 75%?

A. In some cases the loss might be more and in some cases less, but on an average, the appraisal that was made was a fair one, it represented the actual value of the fruit.

Q. But you agree that if the cherries had been reconditioned, it might be found, with reference to a particular barrel, the loss might not be 75% depreciation.

A. I think the answer that I just made covers that. I could just repeat the same answer that I made.

[fol. 228] Certificate

STATE OF OHIO,
Hamilton County, ss:

I, Allen C. Roudebush, a Notary Public in and for the County and State aforesaid, duly commissioned and qualified do hereby certify that the above named James H. Rheinstrom and R. Kramer, were by me first duly sworn, to testify the truth, the whole truth and nothing but the truth, and that the depositions of said witnesses was re-

duced to writing by Margaret Moorman, and signing of same was waived by stipulation of counsel herein.

In testimony whereof, I have hereunto set my hand and official seal this 10th day of February, 1932.

Allen C. Roudebush, Notary Public, Hamilton County, Ohio.

My commission expires December 23, 1933.

[fol. 229] In United States District Court, Southern District of New York

A. 82-357

[Title omitted]

Report of Special Commissioner

To the Honorable the Judges of the District Court of the United States, for the Southern District of New York

The libel in this action was filed to recover for damage to three shipments of cherries in brine, delivered to the claimant at Genoa and Naples in July, 1920, for transportation and delivery at New York and Philadelphia, the shipments having arrived at said ports in a damaged condition.

The case was tried before Honorable Francis A. Winslow, District Judge, October 4, 1927, and resulted in an interlocutory decree in favor of libellant, which was affirmed by the Circuit Court of Appeals without opinion and certiorari was denied on October 22, 1928.

The interlocutory decree directed that the libellant recover from the Steamship "Ansaldo San Giorgio I", the amount of its damages arising out of the matters set forth [fol. 230] in the libel, together with interest and costs, and that it be referred to the undersigned to ascertain and compute the amount of libellant's damage.

I, John E. Morrissey, the Commissioner to whom the matter was referred, respectfully report as follows:

1. To establish the condition, quality and weight of the cherries in these shipments when delivered to the claimant, libellant addressed written interrogatories to two witnesses abroad, August Kiefer and Umberto Gasperini.

Kiefer was the European representative of the libellant. His duties were to purchase cherries, visit the various packing places and supervise the preparation of the cherries for shipment. This included the inspection and weighing of the fruit. Gasperini was formerly employed by libellant and was assistant to Kiefer at the time the shipments in question were made.

As three shipments are involved in this action, I will, for convenience, consider each shipment separately.

Lot 1—8,955 Barrels of Cherries

This shipment was purchased from the Societa Exportazione Agricola Ligure, of Savona, Italy. Kiefer supervised the preparation, inspection, weighing and packing of this shipment. It appears that the cherries were first sorted and all the bad fruit eliminated. They were then sulphured or fumigated, which process preserves them for some time. After being thus treated, the cherries were again sorted [fol. 231] and put in barrels. The barrels used for this lot, although previously used, were in good condition and had been burned, cleaned and paraffined on the inside. Each barrel was weighed and while on the scale was filled with sound cherries up to the net weight shown in the commercial invoice (Exhibit 7, p. 154). Before closing the barrel, a brine solution was added which acted as a preservative. The barrel was again weighed and the net content ascertained. Each barrel was again inspected and initialed by Kiefer before delivery to the carrier for transportation to the loading port. It also appears that Kiefer or Gasperini was present during the entire time the cherries were being prepared, weighed and packed for shipment.

Complaint is made that as part of this lot was prepared and packed for shipment at places other than Savona and Modena, the witnesses had no knowledge as to the condition and weight of the contents of the barrels packed at the other places. The testimony, however, is clear that the small number of barrels of this shipment that were packed at Vogera and Verona, were first shipped to Savona where the heads were removed for inspection of the fruit and a checking up of the weight.

Of this lot, 2,163 barrels in good condition were shipped by rail from Savona to Genoa, the loading port, a distance of 25 miles, and 792 barrels in good condition were shipped

by rail from Modena to Genoa, a distance of 175 miles. Both shipments were made about the middle of July, and the steamship bill of lading issued for this lot is dated July 17, 1920. It appears further, that Gasperini, whose duties required him to look over the shipment at the loading port, [fol. 232] saw this shipment as it was loaded onto the steamer's lighters. He testified that not more than 20 barrels showed signs of having leaked during transportation to the loading port, and that these barrels were immediately recoopered and refilled with the necessary quantity of salt water.

The bill of lading issued by claimant for this lot recites, "Shipped in apparent good order and condition." While this is no admission with respect to the condition of the contents of the barrels, it does show that there was no external evidence of damage to the barrels, and this indicates that the barrels were not leaking or contents damaged when delivered to the claimant.

The proof before the Commissioner makes it clear that the damage to the cherries was the result of the loss of brine due to injury to the barrels. It seems obvious, therefore, that if the barrels were in good condition when delivered to the claimant, so were the contents. As to the few barrels that showed signs of having leaked during transportation to the loading point, the evidence shows that the amount of brine lost from these barrels was negligible and was replaced before the barrels were delivered to claimant. Bearing in mind that the fumigation of the cherries preserved them for some time, it is improbable that any deterioration was caused to the cherries by this slight loss of brine during the short time they were in transit from the shipping points to Genoa.

The testimony of libellant's witnesses is convincing and sufficient in my opinion to establish the condition, quality and weight of the cherries and the sound condition of the barrels when delivered to the claimants. If more were necessary, libellant is entitled to the benefit of the pre- [fol. 233] sumption of continuity, i. e., things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is proved. The application of the presumption of continuity to the law of carriers is well recognized. In Chicago and Northwestern Railway v. Whitnack, 258 U. S. 369, the Court said:

"The condition and quantity of the goods when they were delivered to the first of the connecting carriers, being shown, the presumption will arise that they continued in that condition down to the time of their delivery to the carrier completing the transportation and making the delivery to the consignee, and that the injury or loss occurred while they were in his possession."

To the same effect: Julius Klugman's Sons v. Ocean Steam Navigation Company, 42 Fed. (2d) 461; Gulden v. Hijos De Jose Taya S. En C, 252 Fed. 577.

While upon this feature of the case it may be noted that claimant, aside from cross-examination, offered no evidence to rebut libellant's proof as to the condition, quality and weight of the cherries, and the condition of the barrels.

I find therefore that 792 barrels of this shipment were filled with sound cherries of the net weight of 130 kilos each; that 2,123 barrels were filled with sound cherries of the net weight of 132 kilos each; and that 40 barrels contained culls or Scarto cherries, and that this shipment of 2,955 barrels was delivered to the claimant in good order and condition.

[fol. 234] Lot 2—466 Cask Shipment

This shipment was purchased from Ghisetti Antonio and Cia, and prepared for shipment at the factory of that Company in Modena. Kiefer purchased this lot of cherries and personally supervised the preparation, weighing and shipment of them. The testimony shows the cherries were processed, weighed and packed in the same manner as those in the 2,955 barrel shipment, except that the barrels used for this shipment were new. It also appears that Gasperini looked over the barrels of this shipment in Genoa at the time they were unloaded from the railroad cars and loaded onto the lighters and found that they were all in sound condition, with the exception of about 10 barrels that bore evidence of damage during rail transportation. These barrels were immediately recoopered and refilled with the necessary amount of brine.

Claimant's contention that some of the cherries of this lot were in bad condition at the point where they were prepared for shipment and that these bad cherries may have contaminated the sound cherries, is without merit. Kiefer's

testimony clearly shows that the spotted fruit was separated from the unspotted fruit and the invoice for this lot (Exhibit No. 7, Rec., p. 153) shows the spotted fruit was shipped in different barrels. It also appears that the spotted cherries were sound fruit, but because of the spots were classed as second quality.

For the reasons stated as to Lot 1, which apply with equal force to this shipment, I find that libellant has proved that of this shipment of 466 barrels, 21 barrels contained [fol. 235] sound fruit of good quality, weighing 230 kilos net fruit each; 222 barrels contained sound fruit of good quality, weighing 182 kilos net fruit each; 15 barrels contained sound fruit of good quality, weighing 147 kilos net fruit each; 121 barrels contained sound fruit of good quality, weighing 35 kilos net fruit each; 8 barrels contained second quality fruit, weighing 182 kilos net fruit each; and 79 barrels contained second quality fruit, weighing 35 kilos net fruit each. I also find that this shipment of 466 casks containing sound fruit of the quality indicated, was delivered to the claimant in good order and condition.

Lot 3—845 Barrel Shipment

This shipment was purchased from the Societa Exportazione Agricola Ligure, of Savona, Italy, and was prepared for shipment at Maddaloni Inferiori and Baiano, short distances from Naples, at which port this lot was delivered to claimant.

The testimony with regard to this lot shows that the same was purchased, processed, inspected, weighed, packed and shipped under the supervision of Kiefer and his assistant, Gasperini, in the same manner as Lots 1 and 2.

For the reasons heretofore stated with regard to Lots 1 and 2, I find that the 845 barrels comprising this shipment were filled with sound cherries, first quality, of the net weight of 132 kilos net weight fruit each, in sound containers, and that the same were delivered in like good order and condition to the railroad for transportation to Naples.

It does not appear that either Kiefer or Gasperini saw the barrels comprising this shipment at Naples. The bill [fol. 236] of lading (Exhibit No. 3) issued for this shipment, however, acknowledges receipt of the 845 barrels in apparent good order and condition.

Libellant is entitled to the presumption of continuity, and for the same reasons stated with reference to Lot No. 1, I find that Libellant has proved that the 845 barrels comprising this shipment contained sound cherries of good quality of the net weight of 132 kilos each, and the same were delivered to claimant in good order and condition.

2. Proof as to the extent of the damage to the three shipments has been furnished by Rudolph G. Johnson, an experienced and competent cargo surveyor. Johnson examined and estimated the damage to these shipments as a representative of Kohler, Kemp & Kohler, who were employed by the underwriters of the cargo to ascertain the cause and extent of the damage. Johnson, as representative of the underwriters, would naturally be interested in keeping the damages down. In this respect, the interest of Johnson and the claimant was the same. His testimony, therefore, is especially trustworthy against any claim by claimant that he over-estimated the damage.

The "Ansaldo" arrived at New York where she discharged the 845 barrel shipment, and then proceeded to Philadelphia, where she discharged the other two shipments involved in this action. Johnson first examined the 845 barrel shipment on the ship. He found many of the barrels more or less seriously crushed at the bilges; that a quantity showed signs of leakage; that the brine had leaked out of the barrels and the fruit rotted; and that a large quantity of cherries, and broken and crushed barrel staves [fol. 237] were found lying on the floor of the compartment. After the barrels were discharged from the ship to claimant's dock, a representative of the libellant segregated the damaged barrels and every barrel on which there was any question of damage was examined. After completing his examination of this shipment at New York, Johnson proceeded to Philadelphia and examined every barrel of the other two shipments on which there was any question of damage. The method used to determine the extent of the damage was the same for all shipments. The bung was removed from the barrel and a trier or sampler was inserted and shoved to the bottom of the barrel and then pulled out and cherries obtained from the bottom, center and top of the barrel, several handfuls of cherries were taken from each barrel, placed in a pan and these cherries were then carefully examined to determine the proportion

of cherries that were damaged and to what extent the damaged cherries could be used. Based on his personal examination of each barrel and his years of experience in examining and estimating damage on cargo of this type, Johnson testified to the number of barrels of cherries that were damaged and the extent of the damage as to each barrel.

It is claimed that the method of ascertaining and proving the damage to the cherries is improper. Claimant's argument that in order to determine the extent of the damage it was necessary to remove the head of each barrel, is not persuasive. To do so would have been more expensive than the method used and would have increased the damages which libellant was bound to mitigate. The method employed was the usual method of examining cherries in barrels used in the trade by importers and by [fol. 238] cargo surveyors. It was expeditious, economical and reasonably accurate, and in my opinion, proper.

Damage to cargo may be proved by the estimates of trained men who have examined the cargo and have expert knowledge. This is definitely established by the case of The Rosalia, 1931 A. M. C. 86, affirmed 264 Fed. 285.

It is also claimed that Johnson's estimates were not admissible in evidence for the reason that claimant was given no notice and did not attend the survey at which the estimates were arrived at. The survey itself was not evidence against the claimant because it had not attended (The Pennsylvania Railroad Co. v. Downer Towing Co., 11 Fed. (2d) 466, 468; The Westchester, 254 Fed. 576), but Johnson was not precluded from testifying as to the damage he found while attending the survey. It seems to me, the most that can be urged under such circumstances, is, that such testimony should be most carefully scrutinized and weighed accordingly.

Aside from the cross examination of Johnson, the claimant has offered no proof as to the extent of the damage to these shipments. As heretofore stated, Johnson was interested in keeping the damage down. His interest in this respect was adverse to that of the libellant, and I accept his testimony as to the extent of the damage sustained to each shipment, except as to one lot in the 466 barrel shipment, where I am convinced that he is mistaken. This mistake, however, does not require the rejection of his testimony as

to the extent of damage sustained to the balance of these shipments. The Rosalia, 264 Fed. 285, 289, 2 C. C. A.

3. Libellant contends that the provision in the bill of lad- [fol. 239] ing limiting the recovery to the invoice value of the goods is invalid because there is no evidence that the limitation is based on, or the shipper was offered a choice of rates. Claimant on the other hand, contends that the provisions of the bill of lading are valid and binding on libellant. Each of the three bills of lading contain the following provisions:

"It is mutually agreed as follows:

* * * * * * *

3. The value of each package receipted for as above, does not exceed the sum of $100.00, unless otherwise stated herein, on which basis the rate of freight is adjusted.

* * * * * * *

11. In the event of claims for loss, damage or short delivery, the same shall be adjusted on the basis of the invoice value of the entire shipment, adding expenses necessarily incurred."

Aside from the bills of lading introduced in evidence by the libellant, there is no evidence in the record that the shipper was given a choice between the rate on which the goods were carried with the limitations expressed in the bill of lading and a rate without limitation.

Where a carrier seeks to limit its common law liability by stipulations in its bill of lading, two things are essential, first, there must be some special consideration moving to the shipper for such limitation of liability, such as a choice of rates (Hart v. Pennsylvania Railroad Co., 112 U. S. 331; Boston & Maine Railroad v. Pipper, 246 U. S. 437), and second, a rate based on a choice between limited and unlimited [fol. 240] liability (Union Pacific Railroad Co. v. Burke, 255 U. S. 317).

In the present case, Section 3 of the bill of lading contains the following words, "on which basis the rate of freight is adjusted". This is prima facie evidence that the shipper was given a choice of rates. (Caledonier, 37 Fed. (2d) 257, 259; Leyland & Co. v. Hornblower, 256 Fed. 289,

293; Glanzer v. Cunard Steamship Co., Ltd., 214 App. Div. 473, 479). But the bill of lading does not give the shipper a choice between limited and unlimited liability. The rate charged limits the shipper to a choice between a limitation of $100.00 per package and a limitation to invoice value. No choice is given the shipper between either of said limitations and no limitation at all. Such attempted absolute limitation of liability, regardless of the rate paid, makes the limitation clause void.

Merauke, 31 Fed. (2) 974; Kilthau v. International Mercantile Marine Co., 245 N. Y. 361; Straus & Co. v. Canadian Pacific Railway Co., 254 N. Y. 407; Carso, 1932 A. M. C. 1236.

The measure of recovery, therefore, is the market value of the cherries at destination.

4. The only proof as to the market value of the cherries at destination was furnished by the witness, DeRedon, an importer of this commodity for eighteen years.

He testified that during the months of August and September, 1920, he sold cherries in brine, imported from Italy, to manufacturers of maraschino cherries in New York, Philadelphia and other places. That he sold about ten thousand barrels that year, the bulk of it during the month of August. That the market value of such cherries at New [fol. 241] York and Philadelphia was ten cents (10¢) per pound. At that time there were but two grades of cherries,—prime or whole cherries, and scarto or broken cherries, which were classed as second quality fruit.

The testimony of this witness is not disputed. Here again, claimant, except for cross examination of the witness, failed to offer any evidence to rebut libellant's evidence of market value.

I therefore find libellant's damage as follows:

2,955 Barrel Lot

Damage as ascertained by R. G. Johnson, cargo surveyor (Dep. pp. 14-16) is as follows:

51 bbls.	damaged	10%	5.10 bbls.
35 "	"	15%	5.25 "
8 "	"	20%	1.60 "
100 "	"	25%	25.00 "
79 "	"	40%	31.60 "

116 bbls.	damaged	50%	58.00 bbls.
95 "	"	60%	57.00 "
89 "	"	75%	66.75 "
3 "	"	85%	2.55 "
42 "	"	90%	37.80 "
97 "	"	100%	97.00 "
			387.65 bbls.

It will be noted from the commercial invoice (Exhibit 7, p. 154), that this lot was made up of barrels of 130 and 132 kilos each. As the surveyor did not obtain the marks identifying the 130 and 132 kilo barrels, claimant will be given the benefit of the doubt and it will be assumed that all the [fol. 242] barrels damaged were of the 130 kilo size.

130 kilograms per bbl. at 2.204		286.520 lbs.
387.65 bbls. at 286.520	111,069.47	lbs.
111,069.47 at 10¢ per lb.	$11,106.94	
Credit proceeds of sale of 97 bbls.	50.00	
	$11,056.94	

466 Barrel Lot

The commercial invoice (Libellant's Exhibit 7, record, p. 153), covering this shipment, shows that the cherries were of first and second quality and the barrels of different weights. As there is no proof of the market value at destination of second quality cherries, claim for damage to these cherries will not be allowed.

35 Kilo Lot

It will be noted from the invoice, that barrels of the weight of 35 kilos appear in both the first and second selections. The second selection barrels bore the mark "II". The failure of the surveyor to obtain the marks identifying the quality of the cherries in the damaged barrels makes it impossible to determine which quality cherries of this lot were damaged, and because of the insufficiency of the proof in this respect, no damage will be allowed on the 35 kilo lot.

Damage as ascertained by R. G. Johnson (Deposition, pp. 17, 18), is as follows:

182 Kilo Lot

1 bbl.	damaged	10%	.10 bbls.
1 "	"	15%	.15 "

[fol. 243]

6 "	"	25%	1.50 "
6 "	"	40%	2.40 "
15 "	"	50%	7.50 "
18 "	"	60%	10.80 "
1 "	"	65%	.65 "
30 "	"	75%	22.50 "
1 "	"	85%	.85 "
12 "	"	90%	10.80 "
4 "	"	100%	4.00 "
			61.25 bbls.

In this 182 kilo lot it will be noted there are 8 barrels of second quality cherries. In view of the uncertainty caused by the surveyor's failure to retain the marks on the damaged barrels, claimant will be given the benefit of the doubt and it will be assumed that the 8 barrels which sustained the greatest damage contained cherries of the second quality. The testimony shows that 4 barrels of this lot were damaged 100% and 12 barrels damaged 90%. The 8 barrels of the second quality cherries on this basis show a loss of 7.60 barrels, leaving a loss on the first quality cherries of 53.65 barrels.

182 Kilo Lot

182 per bbl. 2.204 lbs.	401.128 lbs.
53.65 bbls. 401.128	21,520.51
21,520.51 at 10¢ per lb.	$2,152.05

230 Kilo Lot

It will be noted from the bill of lading and the commercial invoice covering this shipment (Libellant's Exhibit 2, page 143; Exhibit 7, page 173), that only 21 barrels of the 230 kilo sizes were shipped. It is obvious, therefore, that [fol. 244] Johnson was in error when he testified that he examined 41 barrels of the 230 kilo size.

This error, coupled with the failure to obtain the marks identifying the particular barrels, renders it impossible to determine exactly the loss on this 230 kilo lot. Under the circumstances, any attempt on the part of the Commissioner to say how many of the 230 kilo barrels were among the 41 barrels examined, and to what extent they were damaged, would be mere speculation, and substituting surmise and conjecture for proof. Owing to the insufficiency of the proof, no damage will be allowed on the 230 kilo lot.

845 Barrel Lot

Damage as ascertained by R. G. Johnson, cargo surveyor (Deposition, pp. 12-13), is as follows:

11 bbls.	damaged	10%	1.1 bbls.
9 "	"	15%	1.35 "
20 "	"	25%	5. "
13 "	"	40%	5.2 "
12 "	"	50%	6. "
29 "	"	60%	17.4 "
31 "	"	75%	23.25 "
14 "	"	90%	12.6 "
16 "	"	100%	16. "
			87.90 bbls.
45 bbls. short delivered (Kramer Record, fol. 93)			45.
			132.9 bbls.
132 kilograms per bbl. at 2.204 lbs.			290.928 lbs.
132.9 bbls. at 290.928 per bbl.			38,664.33
38,664.33 lbs. at 10¢ per lb.			$3,866.43

[fol. 245] 5. The allowance of interest in this case is discretionary. The Scotland, 118 U. S. 507, 518. In deciding this question, I am guided by the considerations expressed in the Benjamin A. Van Brunt, 1930 A. M. C. 2003, 2007.

Libellant's cause of action on the New York shipment accrued in August 1920, and on the Philadelphia shipments in September 1920. The libel in the action was filed March 1, 1922. The correspondence which passed between counsel during that time shows that counsel for libellant, on April 18, 1921, indicated their intent to file a libel in the action, but refrained from doing so and from attaching one

of claimant's vessels, pending authorization of claimant's attorney to appear for the S. S. "Ansaldo San Giorgio I" and file the usual stipulations (Exhibit 4A). On December 13, 1921, Claimant's counsel agreed to appear in the prospective action and file the usual stipulations. I am not inclined to penalize libellant for delays due to courtesies extended, and therefore find that there was no undue delay in bringing the action.

The action was at issue and noticed for trial on November 14, 1922. The case was tried on October 4, 1927. Between these dates nothing was done except during the period between July a id December 1925, when orders for commissions to Italy were obtained, interrogatories prepared, and the commissi n issued and returned. Four years and eleven months elapsed between the time the case was at issue and the time it was reached for trial.

It is essential to bear in mind, however, that an action brought in this Court in 1922 would not have been reached [fol. 246] in its regular order for trial in less than three years. Had the orders for the commissions to Italy been obtained, and the interrogatories prepared at any time during the years 1923 or 1924, libellant would have been in position to try the action in November 1925. No satisfactory explanation has been offered for the delay in taking out these commissions.

I find, therefore, that libellant is properly chargeable with a delay of one year and eleven months in bringing the action to trial.

Following the trial, claimant promptly appealed to the Circuit Court of Appeals, and upon affirmance of the decree, promptly applied to the United States Supreme Court for a writ of certiorari to review the decision of the Circuit Court of Appeals. Its application for a writ of certiorari was denied October 22, 1928.

It appears from the correspondence, that between December 1, 1928 and January 31, 1929, efforts were made by the parties to adjust their differences. Their efforts being unsuccessful, libellant, on February 13, 1929, obtained an order for a commission to Italy to take the testimony of two witnesses for the purpose of proving damages. Interrogatories and cross-interrogatories were promptly pre-

pared and settled and the commission was returned in May 1929. The case remained in statu quo from May 1929 to November 1930, when the deposition of R. G. Johnson was taken in San Francisco. The unexplained delay of one year and six months in taking the deposition of Johnson should deprive libellant of interest for that period.

The first hearing before the Commissioner was held December 23, 1930. Such delays as there were before the Commissioner are chargeable equally to both parties.

[fol. 247] Taking everything into consideration, I find that libellant should receive interest, except for the three years and five months of delay with which it is chargeable, and that the loss of such interest for such period is sufficient penalty for its delays.

Summary

Loss on 2955 bbl. lot	$11,056.94
Interest 9/2/20 to 10/17/32, less penalty of 3 yrs. 5 mos	5,777.25
Loss on 466 bbl. lot	2,152.05
Interest 9/2/20 to 10/17/32, less penalty of 3 yrs. 5 mos.	1,124.45
Loss on 845 bbl. lot	3,866.43
Interest 8/17/20 to 10/17/32, less penalty of 3 yrs. 5 mos	2,029.87
Total	$26,006.99

I therefore find and report the total amount of damages, with interest to date, to be the sum of $26,006.99.

All of which is respectfully submitted.

John E. Morrissey, Commissioner.

Dated New York, New York, October 17, 1932.

[fol. 248] In United States District Court, Southern District of New York

A 82,357

[Title omitted]

Exceptions to the Report of the Commissioner Assessing Damages

The claimant hereby excepts to the report of the Commissioner assessing the damages herein and by him filed

the 18th day of October, 1932, for the following causes and in the following respects, that is to say:

First. In that the Commissioner erred in holding to be void and of no effect the following clause:

"It is mutually agreed as follows: * * *

Eleventh. In the event of claims for loss, damage or short delivery, the same shall be adjusted on the basis of the invoice value of the entire shipment, adding expenses necessarily incurred."

Second. In that the Commissioner erred in finding the measure of recovery to be the market value, in sound condition, of the cherries at destination.

[fol. 249] Third. In that the Commissioner erred in refusing to limit the libellant's damages to the difference, if any, between the value of the entire shipment, in its damaged condition, at destination and the invoice value of the entire shipment.

Fourth. In that the Commissioner erroneously based his findings as to the amount of the libellant's damages not upon any testimony as to the amount and value of the cherries that were lost as a result of the damage complained of, but instead upon a mere rough or general preliminary estimate made at an ex parte survey of the merchandise by the surveyor for libellant's underwriter, of which survey the claimant had received no advance notice and at which it was neither invited to be nor was represented.

Fifth. In that the Commissioner, despite the absence of any proper evidence as to the good condition of the cherries at any time prior to shipment, found that the cherries when delivered to the carrier were in good order and condition.

Sixth. In that the Commissioner erred in finding that the recital in the bill of lading "shipped in apparent good order and condition" was evidence that the contents of the barrels of the various shipments were not damaged when delivered to the claimant.

Seventh. In that the Commissioner erroneously applied for the benefit of the libellant, in order to show the good condition of the cherries and barrels at the time they were delivered to the carrier, the presumption of continuity, ap-

plicable at most only in the case of connecting carriers, i. e., [fol. 250] that things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is proved.

Eighth. In that the Commissioner erred in committing an abuse of discretion in including as an item of damages interest for the period of eight years and eight months despite the fact that libellant allowed the period of twelve years to elapse from the time their alleged causes of action arose and over ten years from the time their libels were filed.

Dated, N. Y., October 22, 1932.

Loomis & Ruebush, Proctors for Claimant, 70 Pine Street, New York City.

[fol. 251] In United States District Court, Southern District of New York

A-82-357

The Rheinstrom Brothers Company, Libellant,

against

S. S. "Ansaldo San Giorgio I," Societa Nazionale Di Navigazione, Claimant

Bigham, Englar, Jones & Houston (F. Herbert Prem, of Counsel), for libellant.

Loomis & Ruebush (Homer L. Loomis, of Counsel), for claimant.

Opinion by Patterson, D. J.

Patterson, D. J.:

The libellant was the owner of three lots of cherries carried by the claimant on its ship "Ansaldo" from Italian ports to New York and Philadelphia. It brought suit for damage to the cherries in transit and prevailed on the merits. By the interlocutory decree the case was sent to a commissioner to ascertain and compute the damages. The commissioner took testimony and filed his report, finding the damages (inclusive of interest) at the

figure of $26,006.99. The case is here on exceptions taken by the carrier.

1. The commissioner held that certain provisions in the bills of lading relative to damages were void. He therefore, took as the measure of damages the market value of [fol. 252] the goods at destination at the time when delivery should have been made. This was of course the proper standard in the absence of valid agreement fixing some other measure or limitation. New York, etc. R. Co. v. Estill, 147 U. S. 591. The carrier's argument is that the invoice value of the goods had been validly agreed upon by the parties as the measure of damages and should control the recovery.

The bills of lading contained the following paragraphs:

"3. The value of each package receipted for as above does not exceed the sum of $100, unless otherwise stated herein, on which basis the rate of freight is adjusted."

* * * * * * *

"11. In the event of claims for loss, damage or short delivery, the same shall be adjusted on the basis of the invoice value of the entire shipment, adding expenses necessarily incurred."

None of the packages in the shipment had a market value or an invoice value as high as $100, and no figure was inserted in the bills of lading as to the value of the goods. It is plain therefore that paragraph 3 has no application to the facts of the case and its validity or invalidity is of no consequence. I do not mean to question its validity; on the contrary I believe it to be valid. But even if void, it is severable from paragraph 11 and of no practical importance in the case. American Railway Express Co. v. Lindenburg, 260 U. S. 584, 589-590; Kilthau v. International Mercantile Marine Co., 245 N. Y. 361, 364. The point presented then is whether paragraph 11 is a valid stipulation [fol. 253] in the shipping contract, providing as it does that any loss shall be adjusted on the basis of the invoice value of the goods plus expenses. There is nothing in the case to indicate that the carrier gave the shipper a choice of rates, one carrying this clause and the other omitting it.

It is fundamental that a carrier may by contract with the shipper agree upon variations of what would in the ab-

sence of special agreement be its responsibilities, provided such variations are reasonable and not inconsistent with public policy. New York R. Co. v. Lockwood, 17 Wall. 357, 380; Cau v. Texas & P. R. Co., 194 U. S. 427. Thus, a requirement that notice of loss be given within a time regarded as reasonable is a valid provision; and so also as to a clause that suit must be commenced within a specified period shorter than that allowed by the statute of limitations, the period being not an unduly short one. Southern Express Co. v. Caldwell, 21 Wall. 264; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657. But a special agreement exempting the carrier from liability for negligence is against public policy and void. Bank of Kentucky v. Adams Express Co., 93 U. S. 174; The Montana, 129 U. S. 397; Boston & Maine R. Co. v. Piper, 246 U. S. 439.

An agreement limiting the value of the goods in case of loss or injury to a sum less than their real value is unreasonable and void, unless the shipper is given a choice of rates based on valuation. Hart v. Pennsylvania R. Co., 112 U. S. 331; Union Pacific R. Co. v. Burke, 255 U. S. 317. The cases in the Supreme Court on limitation of value clauses have all been cases where the valuation set forth in the shipping contract as the maximum was a specified amount, [fol. 254] as $100 a package or $50 a cow. The same rule as to "choice of rates," however, has recently been applied by the Circuit Court of Appeals of this Circuit to a stipulation that the carrier's liability shall not exceed the invoice value of the goods, on the ground that such a clause also is an attempt to cut down the amount for which the carrier would otherwise be liable and is valid only where another rate is offered carrying liability without limit as to amount. The Merauke, 31 Fed. 2nd, 974. To the same effect are Kilthau v. International Mercantile Marine Co., supra, and The Carso, 1932 A. M. C. 1236. The libellant's argument is that the present case is governed by these authorities and that the clause making invoice value the measure of damages is void because there was no choice of rates, one with the clause and one without it.

There is a substantial difference between an agreement that damages shall be adjusted on the basis of invoice value and an agreement that in case of damage no value higher than the invoice value shall be allowed. The latter is a strict limitation agreement, operative only in favor of the

carrier who may always disregard its presence and show that the market value at destination was less than the invoice value and take advantage of that fact. The former is not a limitation clause at all but is a provision fixing a new measure of damages. In instances where the market price of the commodity drops between the time of shipment and the time of arrival at destination, the clause may work out to the benefit of the shipper and the detriment of the carrier. The difference was noted in the Merauke case and in the Kithau case, and the intimation in both opinions is that a provision for computing damages by reference to [fol. 255] invoice value is reasonable and valid without the offer of an alternative rate bearing unlimited liability.

The fact is that such a clause is not unreasonable or offensive to public policy and on principle should be treated as valid. It does not place an artificial or arbitrary value on the goods. It guards the parties against fluctuations in the market while the goods are in transit. It furnishes a ready and convenient standard for measuring the loss in case of damage and tends to promote prompt settlements by leaving no room for extravagant claims of market value at destination. As already observed, it is not exclusively in the interest of the carrier but may frequently confer benefit on the shipper.

There is abundant authority for the proposition that the clause as it stands is valid. For years the cases have been to the effect that a clause in a bill of lading that loss shall be computed on the basis of the invoice price of the goods is valid, although no alternative rate was tendered the shipper or other special consideration given. Coleman v. New York, New Haven & Hartford R. Co., 215 Mass. 45; Fahey v. Baltimore & Ohio R. Co., 139 Md. 161; Davis v. Zimmern, 211 Ala. 63; Grubbs v. Atlantic Coast Line R. Co., 101 S. C. 210; Brockman Co. v. Missouri Pacific R. Co., 195 Mo. App. 607; Denver, etc. R. Co. v. Peterson, 59 Colo. 125; Wallingford v. Atchison, etc., R. Co., 101 Kans. 544; Bowman-Krantz Lumber Co. v. Bush, 104 Nebr. 165; Shaffer v. Chicago, etc. R. Co., 21 I. C. C. 8. See also Duplan Silk Co. v. Lehigh Valley R. Co., 223 Fed. 600, in which Judge Lacombe said that such a clause was "lawfully included" in the bill of lading. The Duplan case incidentally is an authority for the validity of both clause 3 [fol. 256] and clause 11 in the present case. An equivalent

clause, that damages shall be based on value of the goods at time and place of shipment, is likewise held valid. Inman & Co. v. Seaboard Air Line R. Co., 159 Fed. 960; Springfield Co. v. Norfolk & Western R. Co., 260 Fed. 254; The Asuarca, 13 Fed. 2nd, 222; Spada v. Pennsylvania R. Co., 86 N. J. L. 187. See also Phoenix Insurance Co. v. Erie Transportation Co., 117 U. S. 312, 322, where the Supreme Court said obiter that a provision in a bill of lading making the value of the goods at the time and place of shipment the measure of the carrier's liability was valid, although in the absence of such a clause the value at the place of destination would govern the damages. In several other cases, clauses to the same effect as paragraph 3 and paragraph 11 in this case have been construed and applied, their validity having apparently been taken for granted. Western Transit Co. v. Leslie, 242 U. S. 448; Pennsylvania R. Co. v. Olivit Brothers, 243 U. S. 574; Gulf, etc. R. Co. v. Texas Packing Co., 244 U. S. 31. See also The Oneida, 128 Fed. 687. And the plain inference from Chicago, etc. R. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, is that a provision in a bill of lading fixing the carrier's liability at the value of the goods at place and time of shipment is unobjectionable except in cases falling within the first or second Cummins Amendments or some other applicable statute. (49 U. S. C. A., sec. 20 (11).)

I have not overlooked Straus v. Canadian Pacific R. Co., 254 N. Y. 407. That case seems to support the libellant's argument, but it is opposed to the great weight of authority.

In my opinion clause 11 in the bill of lading, requiring that losses be adjusted according to the invoice value of [fol. 257] the shipment, is a reasonable and valid provision, and the commissioner erred in not giving effect to it. The exceptions relative to the measure of damages will therefore be sustained.

2. The construction of the clause is the next question. As an original matter, it might be urged that the libellant ought to recover the invoice value of the damaged goods; that if twenty per cent. of the shipment were lost, the damages should be computed at twenty per cent. of the invoice value of the whole shipment, as under a valued policy of marine insurance. But the effect given to similar clauses in the past has been that the damages are the difference between the invoice value of the entire shipment and the

market value at time and place of destination of the goods in their actual condition. Gulf, etc. R. Co. v. Texas Packing Co., supra; Duplan Silk Co. v. Lehigh Valley R. Co., supra; The Oneida, supra, at pages 692-693. That rule will be followed here. "Invoice value" refers to commercial invoice and not to consular invoice. The libellant is also entitled to freight if prepaid.

3. The commissioner found that the cherries were in good order and condition when received by the carrier. He also made findings as to the quantity of cherries lost or damaged in transit. His findings on these matters are supported by the preponderance of the proof, and the exceptions relative to them will be overruled.

4. Interest on the damages was allowed by the commissioner, except for a period of three years and five months, during which the libellant was taking depositions of wit- [fol. 258] nesses in distant places. The Commissioner held that this was the only delay that was fairly chargeable to the libellant. The claimant has excepted, insisting that no interest should have been allowed. Interest is discretionary in admiralty. The Scotland, 118 U. S. 507. Upon a review of the steps in this protracted litigation, I am satisfied that the commissioner's ruling on interest was fair to both parties. The exception will be overruled.

As already indicated, the exceptions to the measure of damages will be sustained. The other exceptions will be overruled. The parties may submit memoranda as to the computation of damages, pointing out the proof as to invoice value of the entire shipment, market value of the goods at destination in their damaged condition, and expenses incurred.

(Sgd.) Robert P. Patterson, U. S. D. J.

January 30, 1933.

[fol. 259] In United States District Court

[Title omitted]

Order on Exceptions—Feb. 21, 1933

An interlocutory decree having been heretofore duly entered in this cause on the 20th day of October, 1927, order-

ing, adjudging and decreeing that the libellant recover of the steamship "Ansaldo San Giorgio I" the amount of its damages arising out of the matters set forth in the libel and referring it to John E. Morrissey, Esq., Commissioner, to ascertain, compute and report the amount of damages suffered by said libellant, and the said Commissioner having filed his report on the 17th day of October, 1932, fixing the amount of said libellant's damages at the sum of $17,075.42, together with interest thereon from September 2, 1920, to October 17, 1932, less a penalty of three years and five months, amounting to the sum of $8,931.57, making a [fol. 260] total of $26,006.99, and exceptions to the report of said Commissioner having been filed by the claimant, and on consideration the First, Second and Third exceptions having been sustained, and the other exceptions having been overruled;

Now, on motion of Loomis & Ruebush, proctors for the claimant, it is

Ordered that the First, Second and Third exceptions to the report of the Commissioner John E. Morrissey filed herein be and the same hereby are sustained;

And on motion of Bigham, Englar, Jones & Houston, proctors for the libellant, it is

Ordered that the Fourth, Fifth, Sixth, Seventh and Eighth exceptions to the report of the Commissioner John E. Morrissey, Esq., filed herein be and the same hereby are overruled and the report of the Commissioner filed herein be and hereby is confirmed in respect to the matters contained therein relating to the Fourth, Fifth, Sixth, Seventh and Eighth exceptions.

Ordered that the parties may submit memorandums as to the computation of damages on the basis of the proof now in evidence in this cause to the Hon. Robert P. Patterson, United States District Judge.

Robert P. Patterson, U. S. D. J.

[fol. 261] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO AMOUNT OF FREIGHT—March 9, 1933

It is stipulated and agreed by and between the parties hereto that the prepaid freight on the shipment of 466

barrels of cherries in brine was the sum of £200 Sterling, which at the highest rate of exchange obtaining on July 6, 1920, is equivalent to $789.50.

It is further stipulated and agreed by and between the parties hereto that this stipulation shall be substituted for, and take the place of, the one heretofore filed with the Court dated March 6, 1933, which shall be deemed null and void and withdrawn accordingly.

Dated, New York, March 9th, 1933.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Loomis & Ruebush, Proctors for Claimant.

[fol. 262] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A-82-357

[Title omitted]

MEMORANDUM BY PATTERSON, D. J.

PATTERSON, D. J.:

The libellant has not shown, as to any of the three shipments, that the invoice value of the goods plus freight was greater than the actual arrived value. The libel will therefore be dismissed, but without costs.

(Sgd.) Robert P. Patterson, U. S. D. J.

March 14, 1933.

[fol. 263] IN UNITED STATES DISTRICT COURT

A-82-357

Present: Hon. Robert J. Patterson, District Judge.

THE RHEINSTROM BROS. Co., Libellant,

against

S. S. "ANSALDO SAN GIORGIO I," SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant

FINAL DECREE—March 23, 1933

An interlocutory decree having heretofore been duly entered in this cause, to wit, on the 20th day of October, 1927, referring it to John E. Morrissey, Esq., Commis-

sioner, to ascertain, compute and report the amount of the damages suffered by the libellant, and the said Commissioner having filed his report on the 17th day of October, 1932, fixing the amount of said damages at the sum of $26,006.99, and exceptions to said report having been filed by claimant, and, on consideration, the first, second, and third exceptions having been sustained and the fourth, [fol. 264] fifth, sixth, seventh and eighth exceptions having been overruled, and the report of the Commissioner confirmed in respect to the matters contained therein relating to the fourth, fifth, sixth, seventh and eighth exceptions by an order entered herein on the 21st day of February, 1933, and memoranda having been submitted to the Honorable Robert P. Patterson, United States District Judge on the computation of damages herein and it appearing that under the opinion dated January 30, 1933, the libellant has established no recoverable damage, and the Court after due deliberation having rendered its decision dismissing the libel herein, without costs; and it further appearing that the amount of the said Commissioner's fee, endorsed upon the Commissioner's report filed herein, is $1,500, and no exceptions having been filed to the amount of said fee,

Now, on motion of Bigham, Englar, Jones & Houston, proctors for libellant, it is

Ordered, adjudged and decreed that the libel herein be, and the same hereby is, dismissed, without costs, and it is further

Ordered that the Commissioner's fee is hereby fixed and confirmed in the amount of $1,500.

Robert P. Patterson, U. S. D. J.

[fol. 265] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL AND ALLOWANCE

SIRS:

Please take notice that The Rheinstrom Brothers Company, libellant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Sec-

ond Circuit from the final decree entered herein on the 23rd day of March, 1933, and from each and every part of said decree.

Dated May 31, 1933.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Libellant, No. 64 Wall Street, New York, N. Y.

To Messrs. Loomis & Ruebush, Proctors for Claimant, 70 Pine Street, New York, N. Y.

The foregoing appeal is hereby allowed.

Dated, New York, May 31, 1933.

Alfred C. Coxe, U. S. D. J.

[fol. 266] In United States District Court, Southern District of New York

A-82-357

[Title omitted]

Assignment of Errors

The libellant hereby assigns error to the findings, decision and decree of the District Court in the above entitled action, as follows:

First. The Court erred in entering a decree in favor of the claimant dismissing the libel.

Second. The Court erred in failing to grant a final decree to the libellant against the S. S. "Ansaldo San Giorgio I" for the amount of damages reported by the Commissioner.

Third. The Court erred in holding that a provision for computing damages by reference to invoice value, is reasonable and valid without offer of an alternate rate bearing unlimited liability.

Fourth. The Court erred in holding that a bill of lading clause providing for the computation of damages by refer-
[fol. 267] ence to invoice value without the offer of an alternative rate bearing unlimited liability, is not unreasonable or against public policy.

Fifth. The Court erred in failing to hold clause 11 of the bill of lading invalid as unreasonable and contrary to public opinion because there was no evidence that there was a choice of rates available to the shippers.

Sixth. The Court erred in failing to hold that clause 11 of the bill of lading was an attempt to cut down the amount for which the carrier would otherwise be liable without offering the shippers another rate carrying liability without limit as to amount.

Seventh. The Court erred in failing to hold that the claimant has the burden of proving that a choice of rates was available to the shippers.

Eighth. The Court erred in holding that the existence of alternative rates is not essential to the validity of an agreed valuation clause.

Ninth. The Court erred in sustaining claimant's exceptions relative to the measure of damages.

Tenth. The Court erred in holding that under the decision in this case the libellant has sustained no recoverable damages.

Eleventh. The Court erred in failing to hold that the libellant is entitled to have its damages computed upon the basis of the difference between the sound market value of the damaged goods at destination at the time delivery [fol. 268] should have been made, and the value at destination of the damaged goods in their arrived conditon.

Twelfth. The Court erred in holding that, under clause 11 of the bill of lading, the libellant's damages are the difference between the invoice value of the entire shipment and the arrived market value at time and place of destination of the entire shipment, both damaged and undamaged.

Thirteenth. The Court erred in failing to hold that clause 11 is void upon grounds of public policy, in that it permits the carrier, in ascertaining the amount for which he is liable, to charge against the invoice value of the entire shipment the amount realized in a foreign market for the entire shipment, damaged and undamaged, thereby giving the carrier the full benefit of the foreign market value, which opportunity is expressly denied to the shipper.

Fourteenth. The Court erred in failing to hold that the liability of the claimant under clause 11 arises separately for each unit of merchandise damaged.

Fifteenth. The Court erred in failing to hold that clause 11 should be applied distributively upon each article of a shipment that is lost and damaged, for which the carrier is liable.

Sixteenth. The Court erred in failing to hold that under clause 11 the carrier is liable for the difference between the value of the damaged goods, over all charges and expenses, and the invoice value of the damaged goods.

Bigham, Englar, Jones & Houston, Proctors for Libellant.

[fol. 269] In United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Order Overruling Claimant's Objections to Printing of Exhibits

A proposed transcript of record having been served upon counsel for the claimant on the 28th day of July, 1933, and the claimant having raised objections to the inclusion therein of the following matters:

Translations of invoices (referred to in the proposed transcript of record as Libellant's Exhibit 6, pp. 205-208);

Consular invoices (referred to in the proposed transcript of record as Libellant's Exhibit 4, pp. 167, 178);

Copies of letters exchanged between counsel, annexed to a stipulation entered into between proctors for the respective parties hereto (referred to in the proposed transcript of record as Libellant's Exhibit 4a, pp. 179-195 inclusive);

Statement showing docket entries and a record of other [fol. 270] proceedings had in this case (referred to in the proposed transcript of record as Libellant's Exhibit 7, pp. 209-211 inclusive);

and the said objections having been argued before Judge Martin T. Manton, in chambers, on September 8, 1933, and

the Court having overruled all of the said objections, and the Court having further ruled that the transcript of record herein be printed in accordance with the said proposed transcript of record submitted to counsel as aforesaid, a copy of which was produced upon the hearing above re-referred to, without deletion of any part of the contents thereof.

It is ordered that claimant's objections be, and the same hereby are, overruled in all respects, and it is further

Ordered that the record on appeal in this case be printed in accordance with the said proposed transcript of record heretofore served upon counsel for the claimant.

Dated, New York, September 11th, 1933.

Manton, U. S. C. J.

[fol. 271] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter.

Dated, New York, September 20th, 1933.

Bigham, Englar, Jones & Houston, Attorneys for Appellant. Loomis & Ruebush, Attorneys for Appellee.

[fol. 272] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 273] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 179

Argued Jan. 23, 1934. Decided Sept. 17, 1934

THE RHEINSTROM BROTHERS COMPANY, Libelant-Appellant,

v.

The Steamship ANSALDO SAN GIORGIO I, SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

From a final decree dismissing its libel in rem to recover cargo damage from the steamship Ansaldo San Giorgio I, the libelant appeals. Societa Nazionale di Navigazione, claimant of the vessel, is the appellee. Decree reversed.

For opinion below, see 3 F. Supp. 579.

Bigham, Englar, Jones & Houston, of New York City (D. Roger Englar, Henry N. Longley and F. Herbert Prem, all of New York City, of counsel), for appellant.

Loomis & Ruebush, of New York City (Homer L. Loomis and Thomas F. Peterson, Jr., both of New York City, of counsel), for appellee.

SWAN, Circuit Judge:

This suit was begun in March, 1922, to recover for damage in transit to three lots of cherries in brine shipped from Italian ports in July, 1920. An interlocutory decree in favor of the libelant was affirmed by this court without opinion in June, 1928. Rheinstrom Bros. Co. v. Ansaldo San Giorgio I, 26 F. (2d) 1016. A writ of certiorari was denied in Societa Nazionale di Navigazione v. Rheinstrom Bros. Co., 278 U. S. 633, 49 S. Ct. 31, 73 L. Ed. 550. The case then went to a commissioner to compute the recoverable damages. Hearings before the commissioner were begun in December, 1930. He filed his report in October,

1932, finding the libelant's damages, including interest, to be $26,006.99. Upon exceptions to his report, the District Court sustained the commissioner's findings of fact, but concluded that by reason of a certain clause of the bill of lading no damages were recoverable. On March 23, 1933, a decree was entered dismissing the libel without costs. The libelant appealed. Thus this venerable controversy has plodded its weary way to this court for a second time. Comment upon the lapse of years since the cherries in question began their voyage would be superfluous.

Before coming to the merits of the appeal, we must consider a contention by the appellee that no appeal will lie from the decree as entered because it contains a recital that it was made on motion of proctors for the libelant. Numerous authorities are cited to the effect that a party cannot appeal from an order entered on his own motion. Marks v. Leo Feist, 8 F. (2d) 460, 462 C. C. A. 2); United States v. Babbitt, 104 U. S. 767, 768, 26 L. Ed. 921; Raymond v. Tiffany, 115 App. Div. 350, 352, 100 N. Y. S. 807; Munson Realty Co. v. Melrose Bond & Mortgage Corp. 232 App. Div. 832, 834, 248, N. Y. S. 614; McAlpin v. Stoddard, 54 Misc. 647, 650, 105 N. Y. S. 9. But it is clear from the record that this was not a decree to which the libelant consented in any such sense as to bar an appeal. A consent decree is an agreement of the parties under the sanction of the court as to what the decision shall be. See Kelly v. Town of Milan, 21 F. 842, 865 (C. C. W. — Tenn.); Hodg- [fol. 274] son v. Vroom, 266 F. 267, 268 (C. C. A. 2); Wilson v. Haber Bros., 275 F. 346, 347 (C. C. A. 2); Davey Tree Expert Co. v. Frost & Bartlett Co., 300 F. 680, 681 (D. C. Conn.). Here the record shows that the entry of the final decree merely carried into effect the court's previous decision on a litigated issue. The appeal is properly here.

On the merits, the decision turns upon the validity of a provision in the bills of lading reading as follows:

"11. In the event of claims for loss, damage or short delivery, the same shall be adjusted on the basis of the invoice value of the entire shipment, adding expenses necessarily incurred."

The commissioner found a short delivery of 45 barrels, damage of 100 per cent. to 117 barrels, and additional dam-

age equivalent to the loss of 419 barrels, making a total loss of 581 barrels. Since there was no proof that the shipper was offered an alternative freight rate under which the carrier's liability would be unlimited, he held the above-quoted clause of the bills of lading to be invalid and took as the measure of damages the market value of 581 barrels of sound cherries at the port of destination on the day when delivery should have been made. The District Judge, however, concluded that the clause was valid, and directed that the damages should be computed by determining the amount by which the invoice value of the entire shipment, plus freight, exceeded the actual arrived value of the entire shipment. Since the libelant did not prove as to any of the three shipments that the invoice value of the goods plus freight was greater than the actual arrived value, the libel was dismissed.

In the absence of a valid stipulation to the contrary, a common carrier's liability for negligent loss or injury of goods in transit is measured by the market value of the goods at destination, in the condition in which they should have arrived, on the date when they should have been delivered. New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 616, 13 S. Ct. 444, 37 L. Ed. 292; St. Johns N. F. Shipping Corp. v. S. A. Companhia Geral, etc., 263 U. S. 119, 125, 44 S. Ct. 30, 68 L. Ed. 201. It is equally well settled that the carrier may not limit its liability for negligence to a stipulated value for the goods unless the shipper is offered a choice between limited and unlimited liability at alternative rates. Hart v. Penn. R. Co., 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717; Union Pac. R. Co. v. Burke, 255 U. S. 317, 41 S. Ct. 283, 65 L. Ed. 656. In The Merauke, 31 F. (2d) 974, this court, following the decision in Kilthau v. Int. Merc. Marine Co., 245 N. Y. 361, 157 N. E. 267, applied the principle to invalidate a stipulation which purported to limit liability to the invoice cost of the goods. The Merauke involved a true limitation clause, which could inure to the benefit of the carrier only. We intimated that a different result might perhaps obtain in the case of a mutual agreement to accept the invoice cost of the damaged goods as the measure of their value in sound condition at port of destination. A similar intimation may be found in the Kilthau Case. Such an agreement may be of advantage to either party; it guards against fluctuations in the market while the goods are in transit, furnishes a convenient stand-

ard for measuring the damage in case of injury or loss, and tends to promote prompt settlements by excluding extravagant claims of market value at destination. As the District Judge pointed out in the opinion below, there is substantial authority, although not unanimous, in the state courts for holding such an agreement valid even though there is no reduced freight rate to support it. In the federal courts the question does not seem to have been squarely decided; nor do we find it necessary to decide it in the case at bar.

The clause under consideration does not substitute invoice value for market value of the goods lost or injured by the carrier's negligence. It provides that claims "shall be adjusted on the basis of the invoice value of the entire shipment." This means, as the appellee contends and the District Court held, that the invoice value of the entire shipment, not the invoice value of the lost or damaged goods, is to constitute the basis for computing whether damages have been sustained by the shipper. Thus, if there were a short delivery of 50 cases out of a shipment of 100 cases, but the market value at port of destination of the goods delivered was equal to the invoice value of the 100 cases, plus freight, the carrier would pay nothing for its negligent loss of half the shipment; and a similar result would obtain if half the cases were damaged but the market value of all the goods, damaged and undamaged, was greater than their invoice value plus freight. Indeed, in the case at bar, although a substantial part of the cherries were lost or dam- [fol.275] age by the carrier's negligence, it escaped liability because the arrived market value of the cherries in each shipment exceeded the invoice value of the entire shipment plus prepaid freight. A contract which would thus exempt a carrier from liability for losses resulting from its negligence is so unreasonable that it must be held contrary to public policy and void. None of the cases relied upon by the appellee involves a clause purporting to measure damages by the difference between the invoice value of the entire shipment and the market value of the goods delivered when part of the shipment has been lost or damaged; and no decision has been found sustaining the validity of such a clause. Dicta by Judge Addison Brown in Pearse v. Quebec S. S. Co., 24 F. 285, 286 (D. C. S. D. N. Y.), expressly deny the validity of the contract if it be interpreted in this manner. See, also, Boston & M. R. R. v.

Piper, 246 U. S. 439, 38 S. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469. In the opinion below, the District Judge stated that he was following the rule of damages applied under analogous clauses in Gulf, C. & S. F. R. Co. v. Texas Packing Co., 244 U. S. 31, 37 S. Ct. 487, 61 L. Ed. 970, Duplan Silk Co. v. Lehigh Valley R. Co., 223 F. 600 (C. C. A. 2), and The Oneida, 128 F. 687 (C. C. A. 2). We do not so read these authorities. In the Texas Packing Company Case the shipment consisted of five cars of dressed poultry. As the damage arose from a failure to re-ice en route, it seems probable that the entire shipment was injured, and we find nothing in the opinion to indicate that, in case of damage to only part of a shipment, the damages are to be measured by the difference between the invoice value of the entire shipment and the arrived market value of the goods damaged and undamaged. This is likewise true of the opinions in the other two cases cited.

For the foregoing reasons we hold that clause 11 is invalid. Accordingly the decree dismissing the libel is reversed, with costs, and it is ordered that the libelant recover damages as found by the commissioner.

[fol. 276] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 24th day of September, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

RHEINSTROM BROTHERS COMPANY, Libellant-Appellant,

vs.

SS ANSALDO SAN GIORGIO, SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs, and with directions that the libellant recover damages as found by the Commissioner.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 277] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Rheinstrom Brothers Company vs. SS Ansaldo San Giorgio. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Sep. 24, 1934. William Parkin, Clerk.

[fol. 278] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 277, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Rheinstrom Brothers Company, Libellant-Appellant, against SS Ansaldo San Giorgio, Societa Nazionale Di Navigazione, Claimant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of October, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.

[fol. 279] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1934

No. 521

SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant of the Steamship Ansaldo San Giorgio I, Her Engines, Boilers, etc., Petitioner (Claimant-Appellant Below),

against

THE RHEINSTOM BROTHERS CO., Respondent (Libellant-Appellee Below)

Subject to the approval of the Court, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that the printing of the Transcript of Record, filed in the Clerk's office of this Court by the claimant herein on its appeal from the interlocutory decree entered by the libellant upon the decision of the District Court holding the claimant liable for the amount of libellant's damages, which Transcript of Record was offered by the libellant as an exhibit in the proceedings before the Special Commissioner appointed to ascertain the amount of libel-[fols. 280 & 281] lant's damages, and a true copy of which was certified to the Clerk of this Court by the Clerk of the United States Circuit Court of Appeals for the Second Circuit as an exhibit herein, may be omitted from the Transcript of Record to be filed on the petitioner's application for a writ of certiorari, and that for the purpose of further proceedings on certiorari in the United States Supreme Court or to procure therefrom a writ of certiorari said Transcript of Record on the first appeal may be referred to by the Court, and that counsel for either party may in their briefs or upon the argument of further proceedings on certiorari refer to any matter contained in the transcript of record on the first appeal in this case, and that the said Transcript of Record on the first appeal may be handed to the Court upon the presentation of the application for certiorari, and that counsel for either party may in their briefs, or upon the argument of the pending appeal refer to any matter contained in the record on the first appeal in this case.

Dated New York, November 8th, 1934.

Homer L. Loomis, Counsel for Petitioner. D. Roger Englar, Counsel for Respondent.

[fol. 282] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,149. U. S. Circuit Court of Appeals, Second Circuit. Term No. 521. Steamship "Ansaldo San Giorgio I," Societa Nazionale Di Navigazione, Claimant, Petitioner, vs. The Rheinstrom Brothers Company. Petition for a writ of certiorari and exhibit thereto. Filed November 7, 1934. File No. 521, O. T., 1934.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 521

STEAMSHIP "ANSALDO SAN GIORGIO I",
SOCIETA NAZIONALE DI NAVIGAZIONE, CLAIMANT,
Petitioner,

against

THE RHEINSTROM BROTHERS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HOMER L. LOOMIS,
Counsel for Petitioner.

[illegible] Printing Co., 144 Nassau St., New York, N. Y.

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Supreme Court of the United States

OCTOBER TERM 1934.

No.

Steamship "ANSALDO SAN GIORGIO I",
Societa Nazionale di Navigazione,
claimant,
Petitioner,

AGAINST

THE RHEINSTROM BROTHERS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

The petition of steamship "Ansaldo San Giorgio I", Societa Nazionale di Navigazione, claimant, for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows to this Honorable Court as follows:

A.

Summary Statement of Facts Involved.

The petitioner, steamship "Ansaldo San Giorgio I", is a vessel owned by the claimant-petitioner Societa Nazionale di Navigazione, a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Italy.

In response to a libel *in rem* filed by respondent in the United States District Court for the Southern District of New York against said steamship, Societa Nazionale di Navigazione duly appeared as claimant and filed its answer to the libel.

The cause of action sued on arose in August, 1920 (O. R., f. 10, R. f. 626*). The libel which was filed on March 1, 1922 (R. f. 2) complained of damage to three lots of cherries in brine shipped in barrels and casks aboard the steamship Ansaldo San Giorgio I as follows: 2,955 barrels at Genoa for Philadelphia on July 17, 1920 (O. R. f. 6); 466 casks at Genoa for Philadelphia on July 17, 1920 (O. R. f. 8); and 845 barrels at Naples for New York on July 25, 1920 (O. R. f. 9). The complaint was that the cherries on arrival at destination were "not in like good condition as shipped", but were "short, seriously injured and damaged" (O. R. ff. 10-11).

The merits of the case were passed upon by District Judge Winslow (1928 A. M. C. 109) and an interlocutory decree entered in the District Court in libellant's favor on October 20, 1927, and the matter referred to a Special Commissioner to assess the damage (O. R. ff. 476-477). This interlocutory decree was affirmed without opinion (26 F. (2d) 1016) and certiorari was denied (278 U. S. 633) on October 22, 1928 (R. f. 629).

The respondent based its cause of action upon contract, as embodied in and evidenced by bills of lading (O. R. ff. 4, 9-10) which it introduced in evidence as its own exhibits (O. R. p. 141, Libellant's Ex. 1, 3). These bills

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* The reference (R.) found herein refers to the record herein, that is, the record on appeal from the final decree in the District Court; the reference (O. R.), for old record, refers to the record on appeal from the earlier interlocutory decree, which record constitutes Exhibit 3 in these proceedings but by stipulation of counsel was not physically incorporated in the record herein (R. p. 6) and has been separately certified and filed herein as such exhibit in connection with these procedings.

which were all of the same general form and signed by both shipper and carrier contained a clause numbered "Eleventh" as follows:

> "ELEVENTH: In the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred" (O. R. p. 141, R. f. 744).

The hearings before the commissioner for the assessment of damages commenced on December 23, 1930 (R. f. 23). At the first hearing various proofs were offered, including the old record on appeal and libellant's exhibits therein (R. f. 27), which included photostats of the three commercial invoices for the three lots of cherries (O. R. pp. 153, 154, 155, Lib. Ex. 7). At the end of that hearing both parties rested, briefs and reply briefs to be filed and exchanged, which was accordingly done (R. f. 32). Following a lapse of approximately one year without a decision by the commissioner, libellant moved to re-open the reference and put in further testimony, which motion was granted and the second hearing held on December 7, 1931 (R. f. 33), at which time libellant put in evidence translations of the three commercial invoices which were in Italian (R. f. 39). A further hearing was held on January 26, 1932, at which time libellant produced and examined two witnesses to prove market value, and thereupon rested for the second time (R. pp. 15-40).

At the re-opened hearing of December 7, 1931, libellant's counsel revealed for the first time what had happened to the three lots of damaged cherries, stating at that time that libellant itself had used them (R. ff. 41-42). Accordingly, when libellant's counsel rested for the second time without bringing forward evidence through libellant's officers, of the monetary value realized by libellant from its use of the cherries, claimant's counsel proceeded to Cincinnati and took the depositions of those officers,

libellant's counsel attending and cross-examining the witnesses (R. ff. 634-683). That closed claimant's testimony.

The Commissioner rendered and filed his report on October 17, 1932 (R. ff. 11, 741). As it appears by the report the Commissioner first ruled in substance that clause "Eleventh" of the bills of lading as set forth above was a clause limiting liability and was invalid because there was no proof that the shippers had been offered a choice of rates (R. f. 717); that in consequence the measure of recovery was market value. The Commissioner then found that of the three lots of cherries shipped, the contents of 1030 barrels (or perhaps more accurately 1051 barrels, the figure including 45 barrels short delivered) were damaged in varying percentages (R. ff. 722, 726, 727, 730, 731-732). The damage suffered was a damage in value, the barrels containing sound, shrivelled and broken cherries, all of which were used by libellant but for different purposes (R. ff. 648-650). The Commissioner, however, presumably for convenience in computing loss according to the measure he had ruled was applicable, converted these various damage percentages into destroyed cherries, reduced them to pounds and assessed damages as the total of the pounds so found times the market value per pound of sound cherries (R. ff. 722-732), plus interest (R. f. 740), the aggregate of which he found to be $26,006.99 (R. f. 740).

Exceptions were filed to the Commissioner's report (R. ff. 742-749) which were brought on for hearing in the trial court, and following extensive argument, oral and written, the court, after due consideration, sustained the exceptions in so far as they related to the Commissioner's ruling that clause Eleventh of the bill of lading was invalid and in so far as they related to the consequent erroneous method of assessing damage (R. ff. 751-773).

The basis of the District Judge's decision was that since the invoice value of the whole shipment was the basis for computation of loss and damage in any event, irrespective of benefit or detriment that might result, whether to carrier or to shipper, and was not merely designed as a limitation to redound only to the carrier's benefit when the loss and damage would otherwise be larger, it constituted a convenient and reasonable rule for the assessment of damages; that it was fair and proper as introducing an element of certainty into the calculations of the parties and as avoiding the risks of more or less unpredictable fluctuation of the market; that it was fair and equitable since it was equally binding upon both and might prove quite as beneficial to one as to the other; that therefore it needed no special consideration such as choice of rates to support it (R. ff. 756-760, 764-768). In applying clause Eleventh the District Judge treated it as providing a new measure of damages, that should be computed by determining the amount by which the invoice value of the whole shipment exceeded the arrived or damaged value of the shipment (R. ff. 769-770).

A further hearing was then held before the District Judge pursuant to direction to determine whether and to what extent the entire invoice value plus expenses exceeded the arrival value of the shipment. The result of that hearing was that there was found to be no such excess, that the libellant consequently had not suffered damage and the libel was ordered dismissed (R. ff. 785-792).

From the order dismissing the libel, libellant appealed to the Circuit Court of Appeals, assigning as error in substance the holding of the court that clause Eleventh was reasonable and valid; failure to hold that it was invalid because there was no proof of an offer of alternative rates; and the holding that under clause Eleventh the libellant's damages were the difference between the invoice value of the entire shipment and the arrived

market value of the entire shipment, both damaged and undamaged (R. ff. 798-804).

The Circuit Court of Appeals reversed the decree and ordered that libellant recover damages as found by the Commissioner. In its opinion the court held in substance that a mutual agreement to accept the invoice cost of the damaged goods as the measure of their value in sound condition at destination "may be of advantage to either party" and is a salutary provision; that clause Eleventh in the bill of lading, however, "does not substitute invoice value for market value of the goods lost or injured", but "the invoice value of the entire shipment"; that to use the latter standard as the measure of damages here would, by reason of market conditions existing on the date of delivery, allow the carrier to "escape liability" for the "cherries lost or damaged through the carrier's negligence", and so is "unreasonable", "contrary to public policy and void" (R. f. 275). The Circuit Court of Appeals gave no consideration to the benefit to the shipper and the detriment to the carrier that would have resulted had the arrived value of the cherries by reason of market conditions been different; it gave no consideration to the protection against a possibility of an out of pocket loss that the clause gave the shipper during the transit of the goods, a protection not afforded by the common law.

In other words the court gave no consideration whatsoever to the protection against possible loss enjoyed by the shipper under this clause. It gave no consideration to the advantages to the shipper and the detriment to the carrier that might result from its application which, as held by the district judge, was a test of its reasonableness and fairness. The court did not analyze the clause abstractly to determine whether its provisions were reasonable and might prove of benefit to either party. Instead it measured the reasonableness of the clause only by the result of its application under the circumstances obtaining in this particular case.

B.

Reasons Relied on for Allowance of the Writ.

The reason urged by the petitioner for the writ of certiorari herein is that it has been deprived of the benefits of its contract entered into without fraud or deception by reason of a judicial fiat that the contract is invalid on grounds of public policy; that by reason of the traditional sacredness of contract rights and their constitutional protection from interference by state or federal legislation, this Court should itself ultimately pass upon a judicially declared public policy by the federal courts that destroys such right; that a decision dealing with the validity of contract rights on grounds of public policy is one involving an important question of general law, vitally important to the business world at large; that the decision of the Circuit Court of Appeals is untenable, is not in harmony or consistent with the principles upon which agreements of like nature here involved have been upheld and enforced under the great weight of authority, including the authority of this court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and proceedings in said Circuit Court of Appeals in this case, to the end that said case may be reviewed and determined by this Honorable Court and the decision of the Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray.

STATE OF NEW YORK,
County of New York, } ss.:

THOMAS H. WHITE, being duly sworn, deposes and says that he is the New York agent of Italian underwriters that insured the steamer Ansaldo San Giorgio Primo against cargo damage and losses and as such is familiar with the proceedings had herein; that he has read the foregoing petition and that to the best of his information, knowledge and belief the matters therein set forth are true; that the reason why this verification is made by him instead of by some officer or director of the claimant is the fact that the claimant is a foreign corporation and none of its officers or directors are at present in the United States and he is duly authorized to make this verification in their behalf and stead.

THOMAS H. WHITE.

Sworn to before me this 7th
day of November, 1934.

ISABEL GALLAGHER,
Notary Public, New York County
N. Y. Co. Clk's No. 19, Reg. No. 5G365
Kings Co. Clk's No. 62, Reg. No. 3274
Term expires March 30, 1935.

[SEAL.]

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court; and I further certify that it is not filed for the purpose of delay.

HOMER L. LOOMIS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1934.

No.

Steamship "ANSALDO SAN GIORGIO I", Societa Nazionale di Navigazione, claimant,
Petitioner,

AGAINST

THE RHEINSTROM BROTHERS COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinion of the District Court on the merits was rendered on October 20, 1927 (O. R. ff. 471-474), but was not officially reported and was affirmed without opinion (28 F. (2d) 1016). The District Court's opinion sustaining petitioner's exceptions to the Commissioner's report (R. ff. 752-773) is reported in 3 F. Supp. 579. The District Court's memorandum opinion dismissing the libel was rendered March 14, 1933 (N. R. f. 785) and was not officially reported. The opinion of the Circuit Court of Appeals was announced on September 17, 1934 (R. pp. 273-275). It has not as yet been officially reported.

II.

Jurisdiction.

1. The decree of the Circuit Court of Appeals reversing the decree of the District Court dismissing the libel was entered on September 24, 1934 (R. p. 276).

2. This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

3. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended in the Act of February 13, 1925, 43 Stat. 938, U. S. Code, Title 28, Section 347, and under Article 3, Section 2, of the Constitution of the United States.

III.

Statement of the Case.

Inasmuch as a statement of the case necessarily has been made under the heading "A" of the petition, a restatement is omitted here.

IV.

Specifications of Error.

The Circuit Court of Appeals erred in the following respects:

1. In reversing the decree of the District Court dismissing the libel.

2. In ordering that libellant (respondent) recover damages as found by the Commissioner.

3. In holding that clause eleven of the bills of lading is unreasonable and contrary to public policy.

4. In holding that clause eleven of the bills of lading is void.

5. In holding that clause eleven of the bills of lading exempted the carrier from its negligence.

6. In failing to sustain the validity of clause eleven of the bills of lading.

V.

Argument.

POINT I.

An agreement mutually binding on carrier and shipper to adjust claims for loss and damage on the basis of the invoice value of the entire shipment plus expenses incurred does not exempt the carrier from liability for negligence; is merely the substitution of a fair conventional measure of damages defining in advance with certainty the amount thereof for the measure, indefinite and uncertain as to amount, that would be applicable in the absence of agreement; and the Circuit Court of Appeals erred in holding such agreement to be unreasonable, contrary to public policy and void.

At the outset of the consideration of the question here presented it is to be observed that there have been three separate judicial appraisals of the agreement here under consideration, all of which differ among themselves either in the results arrived at or in the premises on which such results are predicated.

The commissioner ruled that the agreement is one limiting the carrier's liability and invalid because "there was no proof that the shipper was offered an alternative freight rate under which the carrier's liability would be unlimited" (Record, p. 274). The District Court held that the agreement "is not a limitation clause at all but is a provision fixing a new measure of damages * * * and may work out to the benefit of the shipper and the detriment of the carrier * * * and is reasonable and valid without the offer of an alternative rate". (R. f. 762). The Circuit Court of Appeals held that the clause "does not substitute invoice value for market value of the goods lost or injured * * * that the invoice value of the entire shipment, not the invoice value of the lost or damaged goods, is to constitute the basis for computing whether damages have been sustained"; that to give the clause such effect in the present case the carrier would pay nothing for a loss and damage caused by its negligence; and that "a contract which would thus exempt a carrier from liability for losses resulting from its negligence is so unreasonable that it must be held contrary to public policy and void" (R. p. 275).

In view of these different constructions, different considerations and different conclusions as to the reasonableness and validity of the clause, we believe it will be appropriate to consider the reasonableness of the clause in the light of existing precedent exclusive of and prior to a consideration of the soundness of the reasons advanced by the Circuit Court of Appeals for holding the clause to be unreasonable and contrary to public policy. We shall therefore consider in the order indicated (1) the reasonableness of the clause; (2) the insufficiency of the reasons set forth by the Court of Appeals on which to predicate a holding that the clause is invalid as being against public policy.

The Reasonableness of the Clause.

The respondent's attack upon the clause both in the District Court and in the Circuit Court of Appeals was upon the grounds advanced by the commissioner for holding it invalid, viz.: That it was a provision limiting the carrier's liability and that there was no proof that the shipper was offered an alternative freight rate under which the carrier's liability would be unlimited (R. ff. 798-800). The cases cited by respondent in the court below in support of the contention of invalidity based on the absence of an offer of alternative freight rates were all cases involving a limitation of liability clause.

That the clause here under consideration is not such a clause is fairly evident, we believe, from a mere reading of the same. It does not purport to limit liability. It is not phrased in words "which are words of limitation", words which distinguish such clauses from others, such, for instance, as agreed valuation clauses (*The Caledonier*, 42 F. (2d) 856, 857). Furthermore, as pointed out in *The Merauke*, 31 F. (2d) 974, 975, a limitation of liability clause "attempts to say that the shipper shall not recover the full measure of the loss he has sustained", and is not at all what we have here, viz.: A mutual covenant "agreeing to accept the invoice cost (plus expenses) as the measure of the value of the goods at port of destination". (See *The Merauke, supra*).

It would seem too clear for argument that the clause here involved does not "attempt to say that the shipper *shall not* recover the full measure of the loss he has sustained". On the contrary, under this clause the shipper not only is *not excluded* from recovering the full measure of his loss, even as measured by the yardstick of the common law, but also he may recover under it an amount greater than his loss as measured by that law. As was said by this Court in *Chicago etc. R. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99, of a bill of lading clause

which, as respondent conceded in its brief below, "was of the same type as that presented here":

> "We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it *does not necessarily prevent a recovery of the full actual loss;* and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule." (Italics supplied).

The construction of the clause as thus given is, it would seem, entirely inconsistent with the definition of a limitation of liability clause as laid down in *The Merauke*, (*supra*). We submit that the intent manifest from its wording, both as a matter of reasonable construction and as a matter of precedent, negatives it as an attempt merely to limit the carrier's common law liability, but establishes it as an agreement fixing a new measure of damages equally binding on carrier and shipper.

It was the sustained contention of respondent below, however, in substance at least, that, under the decisions of this court there cited and relied upon as authorities on measure of damages, a shipper must always be given the opportunity to select under which, the common law measure or one varying that measure, he will ship his goods. We do not so understand the rule, even where the provision involved is a true limitation of liability clause. In *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 430-431, this Court said:

> "But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an 'option and opportunity must be given to the shipper to select under which, the common law or limited liability he will ship his goods.'
>
> If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between

carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174.

Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed."

It seems to us the test of validity here stated is not whether an alternative is presented to the shipper to ship under a liability measured by the common law rule but rather whether the measure of liability under which the goods are shipped is one assented to by the shipper, and whether it is reasonable. The clause here involved, we submit, meets both these tests. That the shipper knew and assented to this clause is apparent from an examination of the bills of lading containing the clause, *which, are signed by the shipper as well as by the carrier* (Record on former appeal, pp. 139, 141) and there is no evidence whatsoever of a protest against or an objection to it, either at the time of shipment or subsequently. That the clause is reasonable would seem to appear upon its face, securing, as it does, the shippers against an out of pocket loss by reason of fluctuations in market during transit and furnishing a ready and convenient standard for measuring loss in case of damage.

Respondent cited and relied upon in the lower court, as we assume it will here, the following cases in this court in support of its contention that the clause here under con-

sideration is invalid, viz.: *Hart* v. *Pa. R. R. Co.* (112 U. S. 331); *Union Pacific R. R. Co.* v. *Burke* (255 U. S. 317); *Adams Express Co.* v. *Croninger* (226 U. S. 491); *Boston & Maine R. R. Co* v. *Piper* (246 U. S. 439); *American Railway Express* v. *Lindenburg* (260 U. S. 584); *Kansas Southern Ry. Co.* v. *Carl* (227 U. S. 639). While it is true that in most of those cases clauses limiting liability to a stated value were held to be valid where the shipper had the option to ship under a rate preserving the unlimited common law liability of the carrier, we do not believe that the process of reasoning by which the court arrived at its determination sustaining such a limitation under such circumstances justifies a conclusion that such an alternative was laid down as a condition for sustaining it. We believe that it fairly appears from the reasoning of those cases, at least when rationalized with the rule stated in others, that the basis for sustaining the limitation was that it was under the circumstances a reasonable provision, and that the option offered the shipper to ship under full liability was clear evidence of its reasonableness. We are strengthened in this view by the decisions of this Court that have sustained other limitations of common law liability in the absence of an option offered of shipping without such limitation. Such limitations so sustained include among others the following, viz.: One providing exemption from liability for damage from various excepted causes (*Clark* v. *Barnwell,* 53 U. S. 272); a limitation exempting for loss occasioned by fire (*York Company* v. *Central Railroad,* 3 Wall. 107; *Bank of Kentucky* v. *Adams Express,* 93 U. S. 174); one limiting liability upon through shipments to losses occurring on carrier's own line (*Railroad* v. *Pratt,* 22 Wall. 123); a provision that in case of loss the carrier shall have the benefit of any insurance effected upon the goods (*Phoenix Ins. Co.* v. *Erie & Western Transp. Co.,* 117 U. S. 312); a provision exempting the carrier from action for loss and damage unless the shipper file notice of claim for loss or damage

within a defined time (*Express Co.* v. *Caldwell,* 21 Wall. 264; *Queen of the Pacific,* 180 U. S. 49). These and kindred limitations and variations of common law responsibility are sustained because they are reasonable, and not because of any option offered to the shipper to ship without such a limitation of the carrier's common law liability.

We believe therefore that the governing rule to be evolved from the cases in this Court is, that, in determining the validity of any provision which limits the carrier's full responsibility at common law, the test to be applied is the reasonableness of the limitation; and that this rule applies to a limitation of the common law liability in case of loss or damage just as it applies to other limitations of the carrier's common law responsibility.

However, even if it may be said that under the decisions of this Court an opportunity to ship under alternative rates is a condition for sustaining a provision limiting liability in case of loss, the clause under consideration here, as pointed out above, is not such a provision. And the respondent did not below, and we submit cannot here, cite any decision in this Court holding such a clause unreasonable, although in *Chicago etc. Ry. Co.* v. *McCaull-Dinsmore Co.* (*supra*) the Court, despite its favorable consideration, felt compelled to hold it unenforceable as to interstate shipments by reason of the command of an amendment to the Cummings Act. On the other hand, where the clause has received this Court's consideration, as we shall later point out, and where its judgment has not been bounded by legislative enactment, it has received the Court's approval.

It is true, of course, that an agreement that exempts a carrier from its negligence is unreasonable and, as said by respondent in its brief below, such an agreement is no more valid because it rests upon consideration than if without consideration (*Kansas Southern Ry.* v. *Carl,* 227 U. S. 639, 650). But the mere fact that the effect of a

provision may be to alter the ultimate financial responsibility of the carrier or recovery of the shipper does not give it the character of exempting the carrier from its negligence. Even a clause limiting the carrier's liability to an arbitrary amount bearing no relation to actual value is valid (*Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 285), because it is reasonable for the carrier to measure its responsibility in relation to rate charged (*Adams Express Co.* v. *Croninger*, 226 U. S. 491, 510) and such limitation "has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on" (*Adams Express Co.* v. *Croninger* (*supra*).

In the absence, therefore, of a provision that in terms expressly or impliedly exempts the carrier from the results of its negligence, the determination of whether a given clause does or does not contravene public policy must rest, in the last analysis, as it seems to us, upon its fairness and reasonableness under the circumstances (as, for example, whether it may prove of benefit to the shipper and of detriment to the carrier, as well as the reverse) and not upon the fact that it may alter the ultimate financial responsibility of the carrier or recovery of the shipper where the carrier has been negligent. We are brought again, therefore, to a consideration of the reasonableness of the clause here under consideration, which admittedly alters the common law responsibility of the carrier by substituting a new measure of damages where loss and damage occur.

As introductory and persuasive reasoning in support of the reasonableness of the clause, we cannot better the cogent and, as we believe, sound analysis of it set forth in the opinion of the District Court, where that Court said: (*The Ansaldo San Giorgio I* (3 F. Supp. 579, 581, R. pp. 761-763):

> "There is a substantial difference between an agreement that damages shall be adjusted on the basis of

invoice value and an agreement that in case of damage no value higher than the invoice value shall be allowed. The latter is a strict limitation agreement, operative only in favor of the carrier who may always disregard its presence and show that the market value at destination was less than the invoice value and take advantage of that fact. The former is not a limitation clause at all, but is a provision fixing a new measure of damages. In instances where the market price of the commodity drops between the time of shipment and the time of arrival at destination, the clause may work out to the benefit of the shipper and the detriment of the carrier. The difference was noted in the *Merauke* Case (*The Merauke*, 31 F. (2d) 974) and in the *Kilthau* Case, (*Kilthau* v. *International Mercantile Marine Co.*, 245 N. Y. 361,) and the intimation in both opinions is that a provision for computing damages by reference to invoice value is reasonable and valid without the offer of an alternative rate bearing unlimited liability.

The fact is that such a clause is not unreasonable or offensive to public policy, and on principle should be treated as valid. It does not place an artificial or arbitrary value on the goods. It guards the parties against fluctuations in the market while the goods are in transit. It furnishes a ready and convenient standard for measuring the loss in case of damage, and tends to promote prompt settlements by leaving no room for extravagant claims of market value at destination. As already observed, it is not exclusively in the interest of the carrier, but may frequently confer benefit on the shipper."

It was the expressed opinion of respondent below, shared apparently by the Circuit Court of Appeals, that although the clause had been held valid by the state courts without an offer of alternative rates, its validity under such circumstances did not seem to have been squarely decided by the federal courts. We submit that on principle and in substance the federal courts have squarely decided the question and upheld the validity of the clause. In *Phœnix Ins. Co.* v. *Erie Transp. Co.* (117 U. S. 312, 322), this Court,

defining the limits of the rights under subrogation of a cargo insurer in an action brought by the latter against the carrier, said:

> "any lawful stipulation between the owner and the carrier of the goods, limiting the risks for which the carrier shall be answerable, or the time of making the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier; * * * So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in *Mobile & Montgomery Railway v. Jurey*, 111 U. S. 584."

In *The Oneida*, 128 Fed. (C. C. A. 2nd) 687, the bill of lading contained the following clause (p. 689):

> "'In ascertaining the amount of such damage, the same shall be computed at the value or cost of the said goods or property at the time and place of shipment.'"

In that case, involving damage to the goods carried, Judge Wallace, considered the effect of the clause and, after pointing out that its language is more consistent with the meaning "that as a basis for computing the damages their cost or value at the place of shipment is to be substituted for their market value at the place of destination", continued at page 692:

> "The clause was probably inserted for the benefit of both parties, and to relieve either from the chances of an excessive loss arising by abnormal fluctuations in the market value of the goods occurring after the time of shipment, and whereby the market value at the time of delivery might be much higher or much lower than at the time of shipment, or than ordinarily. * * * Under a bill of lading like the present the

shipper's loss is fairly measured by the difference between the cost or value of the goods at the time and place of shipment and their value in their damaged condition at the place of delivery, together with the expenses incurred for their transportation."

In *Duplan Silk Co.* v. *Lehigh Valley R. Co.*, 223 Fed. Rep. 600, Judge Hough, in delivering the opinion of the District Court, quoted in the affirming opinion of the Circuit Court of Appeals, said, referring to the decision in *The Oneida*, (*supra*), relative to the construction of the clause:

"It was held to be a conventional substitution of the former value for the latter; the shippers were estopped from using or claiming the higher value, which was the real value."

In *Gulf, Colorado Ry.* v. *Texas Packing Co.*, 244 U. S. 31, this Court had before it a clause similar to the one here under consideration. The clause as set forth at page 36 reads as follows:

"'The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.'"

This Court, speaking by Mr. Justice Day in holding that the clause changed the rule of damages otherwise applicable, said at page 37:

"Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the prop-

> erty in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. *New York, Lake Erie & Western R. R. Co.* v. *Estill*, 147 U. S. 591, 616. The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damages."

In holding the clause enforceable, and construing the manner of its application, Mr. Justice Day further said at page 36:

> "The testimony showed that the invoice price of the poultry at Temple to the Packing Company was $22,238.56, and that the poultry was worth at least that sum at Temple at the time of shipment. We think that in taking this sum as the basis of computing damages the trial court did but enforce the stipulation in the bills of lading. That sum was the *bona fide* invoice price to the consignee, which the bills provided was to be the basis of recovery in case of loss or damage. We think the court properly charged the jury to take the difference between this invoice price and the value of the poultry at the time the same was delivered in Chicago in arriving at the amount of damages. No question is raised in this case as to the right of the plaintiff to recover also the freight paid. See *Pennsylvania R. R. Co.* v. *Olivit Bros.*, 243 U. S. 574."

The same type of clause had been before this Court in *Pennsylvania R. R. Co.* v. *Olivit Bros.*, 243 U. S. 574, 586, and the provision therein relative to the inclusion of freight charges affirmatively enforced against the carrier.

In neither of these cases, nor in *The Oneida, supra*, was there any suggestion that the enforceability of the clause was dependent upon the carrier's having offered the shipper alternative freight rates. And the reasoning both in the *Gulf, Colorado* case in this Court and in *The Oneida* in the Circuit Court of Appeals, particularly in the latter, negatives the presence of any such choice of rates as the

reason for enforcement, and places it upon the entirely different grounds set forth as quoted above.

In the state courts the great weight of authority supports the clause as reasonable without an offer of alternative freight rates. As was pointed out by the District Court (*The Ansaldo San Giorgio I, supra,* at page 581, R. ff. 764-765):

> "There is abundant authority for the proposition that the clause as it stands is valid. For years the cases have been to the effect that a clause in a bill of lading that loss shall be computed on the basis of the invoice price of the goods is valid, although no alternative rate was tendered the shipper or other special consideration given. *Coleman* v. *New York, New Haven & Hartford R. Co.*, 215 Mass. 45, 102 N. E. 92, 7 A. L. R. 1366; *Fahey* v. *Baltimore & Ohio R. Co.*, 139 Md. 161, 114 A. 905; *Davis* v. *Zimmern*, 211 Ala. 63, 99 So. 307; *Grubbs* v. *Atlantic Coast Line R. Co.*, 101 S. C. 210, 85 S. E. 405; *Brockman Commission Co.* v. *Missouri Pacific R. Co.*, 195 Mo. App. 607, 188 S. W. 920; *Denver, etc., R. Co.* v. *Peterson Grocery*, 59 Colo. 125, 147 P. 663; *Wallingford Bros.* v. *Atchison, etc. R. Co.*, 101 Kan. 544, 167 P. 1136, L. R. A. 1918B, 716; *Bowman-Kranz Lumber Co.* v. *Bush*, 104 Neb. [illegible] 176 N. W. 91; *J. C. Shaffer Co.* v. *Chicago, etc., R. Co.*, 21 I. C. C. 8."

In its brief in the Circuit Court of Appeals respondent conceded that all but four of the above cases cited by the District Court upheld the clause as valid without a "choice of rates • • • and appear to support the reasoning of the District Court".

That these cases and others that may be cited do support the reasoning of the District Court can hardly be doubted. A review of the state court cases, or even a major portion of them, however, is not within the compass of this brief, and we shall confine ourselves to a reference to only two or three from widely separated jurisdictions.

In *Grubbs* v. *Atlantic Coast Line R. Co.*, 85 S. E. 405, 101 S. C. 210, the bill of lading contained a clause similar

to that before this Court in the *Gulf, Colorado* case (*supra*). The Supreme Court of South Carolina, in reversing the decision of the Circuit Court holding the clause unenforceable because not supported by the consideration of a reduced freight rate, said at page 405:

> "The bill of lading does not show that there was an agreement that, in consideration of a reduced rate of shipment, the amount of recovery in case of loss would be limited to a specified amount. On the contrary, the language of the bill of lading negatives any such agreement. The provision in the bill of lading was merely intended to establish a rule for determining the value of the property in case of loss, irrespective of the fact whether it was greater at the point of shipment or destination, which could not be foreseen, on account of the fluctuation in prices. It was for this reason that such a rule was upheld in *Matheson* v. *Railway*, 79 S. C. 155, 60 S. E. 437, which is conclusive of this case. It will thus be seen that the principle announced in the case of *Johnstone* v. *Railroad Co.*, 39 S. C. 55, 17 S. E. 512, is not applicable."

In *Denver & R. G. R. Co.* v. *Peterson Grocery Co.*, 147 Pac. 663, 59 Colo. 125, the bill of lading also contained a clause similar to the one in the *Gulf, Colorado* case (*supra*). In reversing a judgment for the plaintiff because of error in instruction as to damages, the Court said at pages 664-665:

> "Plaintiff's proof on this question (damages) was limited to the market value at the time and point of destination. The defendant offered no testimony on the subject. By instruction 7 the jury were told, in substance, that if they found for the plaintiff, its damages should be computed on the basis of the value of the property at the point of destination. Exceptions were taken to this instruction. It does not appear that this clause in the bill of lading was supported by a reduced freight rate or other special consideration, and, in the absence of such evidence, we must assume that it was not. • • •

In *Pierce* v. *So. Pac. Co.*, 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350, the contract made the invoice price at the point of shipment the measure of damages. It was sustained, but there was added as an element of damage the freight actually paid and interest on the whole amount.

In volume 4, Elliott on Railroads (2d Ed.) § 1510a, volume 5, Am. & Eng. Ency. of Law (2d Ed.) p. 335, volume 6, Cyc. p. 401, and volume 1, Hutchinson on Carriers (3d Ed.) § 430, the conclusion stated on this subject, in substance, is that the great weight of authority supports the validity of such stipulations where they have been freely and fairly entered into, whether the loss be the result of the carrier's negligence or not, and that it does not require a reduced freight rate to sustain it. This conclusion appears to be supported by many of the later decisions. *Spada* v. *Penn, R. Co.* (N. J.) 92 Atl. 379; *Inman & Co.* v. *Seaboard Air Line Ry. Co.* (C. C.) 159 Fed. 960; *Central of Ga. Ry. Co.* v. *Murphey & Hunt*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Tibbits* v. *R. I. & P. Ry. Co.*, 49 Ill. App. 567; *Davis* v. *N. Y., Ont. & West. Ry. Co.*, 70 Minn. 37, 72 N. W. 823; *101 Live Stock Co.* v. *K. C. & M. B. Ry. Co.*, 100 Mo. App. 674, 75 S. W. 782; *C., R. I. & P. Ry. Co.* v. *Harmon*, 17 Ill. App. 640; *Boscowitz* v. *Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Matheson* v. *So. Ry. Co.*, 79 S. C. 155, 60 S. E. 437; *Gratiot St. Warehouse Co.* v. *M., K. & T. Ry. Co.*, 124 Mo. App. 545, 102 S. W. 11.

This clause was included in a uniform bill of lading recommended by the Interstate Commerce Commission in 1908. 14 Interst. Com. Com'n R. 346. It has since been held valid by that tribunal in an interstate shipment in a case where the loss was occasioned through the negligence of the carrier. *Shaffer & Co.* v. *C., R. I. & P. Ry. Co.*, 21 Interst. Com. Com'n R. 8.

In the case last cited there was a total loss to the consignee, for which reason the payment of freight at the point of destination did not enter into the computation. While this court has never passed directly upon this question, a detailed discussion of it could add but little to what has been said *pro* and *con* in the cases cited, for which reason we will not undertake it, but dispose of it by saying that, as it appears to be

recognized as valid in interstate shipments, and also has been held reasonable and valid when fairly and freely entered into by a majority of the state courts which have heretofore passed upon it in intrastate shipments, we are of opinion that we should adopt the conclusion of the majority, and hold it valid so far as it is applicable, until the Supreme Court of the United States declares otherwise, or until further legislation is enacted on the subject."

In *Davis* v. *New York, O. & W. Ry. Co.*, 72 N. W. 823, 824, 70 Minn. 37, cited with approval by this Court in *Penn. R. R. Co.* v. *Olivit Bros.* (*supra*), in holding enforceable a clause substituting the value of the goods at point of shipment without providing for the addition of transportation costs as the measure for computing damages, the Court said:

"The bill of lading introduced in evidence * * * contained a stipulation that the amount of any loss or damages for which any carrier became liable should be computed at the value of the property at the place and time of shipment, unless a lower value had been agreed upon. * * * Upon reflection and consideration we are of the opinion that, in a condition of this nature, there is nothing which excludes from a computation of damages, such sums as may be paid or incurred by a consignee as transportation charges. The condition is simply that the amount of any loss or damage shall be estimated and fixed at the value of the property at the time and place of shipment, and, in the absence of such special contract, the measure of damages is settled by the value at the place of destination, charges for transportation entering into the computation. * * * *If transportation charges paid or incurred by or on behalf of the consignee, or earned by the carriers, but not paid, are to be taken into consideration, we cannot say that the condition is on its face unjust, unreasonable or opposed to public policy.*" (Italics supplied.)

In the case at bar, it is to be remembered, it was *expressly* provided that all such transportation and other

charges necessarily incurred should be included in the value of the merchandise.

The respondent contended below that in four of the cases cited by the District Court there was no discussion of, and that it does not appear, "whether or not there was a choice of freight rates". We think, however, that it does appear from the opinions in those cases that the clause was upheld because reasonable, without any reference to or dependency upon a choice of rates. For instance, in *Davis* v. *Zimmern*, 211 Ala. 63, 99 Southern 307, one of the cases referred to by respondent, the reasoning of the court, in sustaining the clause, is quite inconsistent with the necessity of a choice of rates as a condition of its validity. In that case a clause similar to the one under consideration in the *Gulf, Colorado* case (*supra*) was involved. The Court, quoting from one of its own previous decisions, viz., *South. Ry. Co.* v. *Cofer*, 149 Ala. 565, said:

> "'* * * It will be observed that no exemption from liability on account of negligence is involved in this stipulation, but the sole effect of it is to fix the place at which the price of the cotton shall be ascertained in respect to the measurement of damages. It has been held that such stipulations in bills of lading are reasonable and enforceable. * * *'

The decision there was that the stipulation, being reasonable and enforceable on its face, was applicable to loss from the carrier's negligence, and required no special consideration to support it. * * *

Dealing with this identical stipulation, the following cases hold it as valid and enforceable against negligent loss or injury, and without any special consideration—as a reduced freight rate—to support it: *Denver, etc. R. Co.* v. *Peterson Co.*, 59 Colo. 125, 147 Pac. 663; *Gratiot St. W'house Co.* v. *M., K. & T. Ry. Co.*, 124 Mo. App. 545, 102 S. W. 11; *Wallingford* v. *A. T. & S. F. Ry. Co.*, 101 Kan. 544, 167 Pac. 1136, L. R. A. 1918B, 716; *Bowman-Kranz Lbr. Co.* v. *Bush*, 104 Neb. 165, 176 N. W. 91; *F. W. Brockman, etc., Co.* v. *Mo. Pac. Ry. Co.*, 195 Mo. App. 607, 188 S. W.

920; *Coleman* v. *N. Y., etc., R. Co.*, 215 Mass. 45, 102 N. W. 92, 7 A. L. R. 1366; *Grubbs* v. *A. C. L. R. R. Co.*, 101 S. C. 210, 85 S. E. 405; *Inman* v. *S. A. L. R. Co.* (C. C.) 159 Fed. 960).

In *Wallingford* v. *Ry. Co., supra,* the Kansas court said:

> 'In our opinion the measure of damages as fixed by the contract is reasonable, valid and controlling. The provision is intended to establish a rule for determining the value of the property in the event of loss and not, as plaintiffs contend, to limit or diminish the carrier's liability'.

And in *Coleman* v. *N. Y., etc., R. Co., supra,* the Massachusetts court said:

> 'It was a reasonable contract to base the damages to be recovered in case of loss upon the genuine and honest invoice price between the parties. There is nothing contrary to public policy in such a contract.' * * *
>
> We conclude that, upon sound principle, as well as upon settled authority, the stipulation in the bills of lading here presented is valid and binding, and must be given effect according to its terms."

The state court case chiefly relied upon below by respondent was *Ruppel* v. *Alleghany Valley R. R. Co.*, 31 Atl. Rep. 478. In that case the Supreme Court of Pennsylvania held invalid as one limiting liability a bill of lading clause which provided that loss or damage "shall be computed at the value of property at the time and place of shipment". The court held that this provision was "palpably a limitation of or reduction on the loss of the shipper. The sole inducement to shipment of marketable commodities is the higher price at point of destination".

The above court's conclusion as to the invalidity of the clause, it is apparent, is based on two assumptions, both of which, it is submitted, are untrue in fact. Contrary to the first assumption, it is common knowledge that, as it will be observed, the courts in a number of the above

cited cases judicially noticed, due to market fluctuation during transit the goods are often of less value at destination than at point of shipment. The second assumption, viz., that the sole inducement to shipment is a higher price at point of destination, is equally untrue in fact. As often as not goods are consigned by shippers from one port to their agents at another simply to secure a wider market for their goods. The shipper's margin of profit is included in the consignment invoice price, and where the shipper is guaranteed his transportation and other costs, as here, he is secured not only against an out of pocket loss but his profit is preserved as well. It is obvious, we believe, that the Pennsylvania court's reason for holding the clause void is entirely unsound.

It is to be noted here in passing that the Pennsylvania courts refuse to sustain any limitation of the carrier's common law liability as to damages. The difference between the rule obtaining in the Pennsylvania courts and that obtaining in this court in this respect was pointed out in *Grogans Case*, 114 Pa. 529. The difference was also noted in *Macfarlane* v. *Adams Express Co.*, 137 Fed. Rep. 982, where the Court, although sitting in Pennsylvania, refused to follow the rule obtaining in the Supreme Court of that State, as announced in, among others noted, the *Ruppel* case (*supra*).

The State Court of Appeals in New York has not squarely decided the question, but, as pointed out in *The Merauke* (*supra*) and by the District Court (R. f. 762), there is a distinct intimation, if nothing more, in *Kilthau* v. *International Mer. Marine Co.* (245 N. Y. 361, 366), that, if the effect of a clause is to "provide a new measure of damages of which either party may claim the benefit" and not "a valuation clause solely to limit liability", it is valid and enforceable. Respondent contended below that this view was abandoned in the case of *Straus* v. *Canadian Pac. Ry. Co.* (254 N. Y. 407). We submit, however, that there is nothing in the decision in

that case that necessarily alters the court's view expressed in the *Kilthau* case. The *Straus* case, moreover, was ignored below by the Circuit Court of Appeals as expressing any view different from or inconsistent with that expressed in the *Kilthau* case, the court re-affirming its intimation as expressed in *The Merauke* (*supra*), as coinciding with that expressed in the *Kilthau* case, that where the agreement was to accept the invoice cost of the damaged goods as the measure of value at destination it was one that may be of advantage to either party, and a salutary provision.

The insufficiency of the Court's reasons for holding the clause unreasonable and against public policy.

Since it is apparent from its opinion that the Circuit Court of Appeals did not accept respondent's contention, or place its decision on the ground, that the clause is invalid because of no choice of freight rates, and since the opinion definitely negatives that as the ground for its determination, we are brought to a consideration of the reason advanced by that court for reversing the decision of the District Court and the sufficiency of that reason as a basis for the determination that the clause is unreasonable, contrary to public policy and void. The reason for so holding with the accompanying supporting illustration is set forth in the opinion of the Circuit Court of Appeals as follows (R. p. 274):

> "The clause under consideration does not substitute invoice value for market value of the goods lost or injured by the carrier's negligence. It provides that claims 'shall be adjusted on the basis of the invoice value of the entire shipment.' This means, as the appellee contends and the district court held, that the invoice value of the entire shipment, not the invoice value of the lost or damaged goods, is to constitute the basis for computing whether damages have been sustained by the shipper. Thus, if there were a short delivery of 50 cases out of a shipment of 100

cases, but the market value at port of destination of the goods delivered was equal to the invoice value of the 100 cases, plus freight, the carrier would pay nothing for its negligent loss of half the shipment; and a similar result would obtain if half the cases were damaged but the market value of all the goods, damaged and undamaged, was greater than their invoice value plus freight. Indeed, in the case at bar, although a substantial part of the cherries were lost or damaged by the carrier's negligence, it escaped liability because the arrived market value of the cherries in each shipment exceeded the invoice value of the entire shipment plus prepaid freight."

We believe that it is a fair criticism of the Court's exposition of the clause, as set forth above, to point out that it envisions only a one-sided view of the picture that the clause presents, and an altogether too imperfect one to judge of its merits or reasonableness. A more perfect view and a truer reflection of its accomplishments, to adopt a method of exposition somewhat similar to that used by the Court of Appeals, may be set down as follows:

Thus, if there were a *short delivery,* whether of 1 or 50 cases out of a shipment of 100 cases, and the market price at port of destination of the goods delivered was less than the invoice price plus expenses incurred by shipper, the latter is guaranteed a recovery, irrespective of market price or the number of cases lost, of the total invoice value of the shipment plus all expenses incurred; and, in the event that the market price, by reason of fluctuating or unsteady condition, is materially lower than the invoice value, the carrier must pay proportionately greater damages for its negligent loss than that for which it would be liable under the common law measure. And a similar result would obtain irrespective of whether 1 or 50 of the cases were *damaged* and whether the market price of all the goods damaged and undamaged was less than the invoice value; the shipper is guaranteed irrespective of market price or number of cases *damaged* the total invoice value of the shipment plus expenses, and, as

> in the case of *loss,* if the market price is materially lower than invoice value, the carrier must pay proportionately greater damages for its negligence than those for which it would be liable under the common law.

In other words, under this clause, the carrier guarantees the shipper against an out of pocket loss irrespective of market conditions at destination, and, by reason of such guarantee, it may result that the carrier must pay greater damages for its negligence than those for which it would be liable under the common law measure.

The fault, we submit, in the court's reasoning, by which it arrived at the conclusion that the clause exempts the carrier from liability for its negligence, lies in the false assumption that the standard by which to measure loss and damage is the common law measure, whereas, (under the standard agreed upon), damage is to be measured by the invoice value of the entire shipment plus expenses. The court conceded that the arrived market value of the cherries "exceeded the invoice value of the entire shipment plus prepaid freight". That being true, the shipper obviously has suffered no damage *under the agreed standard for measuring it.* And, since we are here considering negligence in terms of damage resulting therefrom, inasmuch as the shipper suffers no damage under the clause, necessarily the clause provides no exemption from damages or negligence for the carrier.

A conclusion that a clause is invalid and against public policy, as exempting the carrier from its negligence, may not be arrived at by a showing that under it the carrier escapes liability as measured by the common law. If that were true the agreed value or limitation clauses would in many cases be invalid. The rule is, however, that, notwithstanding the agreed value or limitation is purely arbitrary and grossly disproportionate to actual value or to that provided by the common law, it will not be held invalid for that reason, (*Pierce Co.* v. *Wells, Fargo*

& Co., 236 U. S. 278). The test as to validity is, as we believe we have demonstrated above, as follows: Is the clause reasonable under the circumstances? Does it provide the shipper with some compensating right, or is it for the sole benefit of the carrier? As was said in *Union Pac. R. Co.* v. *Burke*, 255 U. S. 317, 323, (much relied upon and quoted by respondent in the lower court), where this court held a limitation clause invalid on its appearing that the shipper was given neither alternative rates nor other compensating privilege:

> "To allow the contention of the petitioner, would permit carriers to contract for a partial exemption from the results of their own negligence without giving the shippers any *compensating privilege.* Obviously such agreements could be made only with the ignorant, the unwary or with persons deliberately deceived." (Italics supplied).

It is of interest to note that the bill of lading in the above case also contained a clause similar to the one under consideration in the *Gulf, Colorado* case (see p. 320). And although this Court, as had the New York Court of Appeals, rejected the limitation clause also contained in the bill, it gave full effect to the clause substituting invoice value for market value at destination.

What outlawed the clause below in the eyes of the Circuit Court of Appeals was the provision therein that the unit, on the invoice value of which the loss and damage was to be computed, was "the entire shipment", instead of that part of the shipment which was lost and damaged. The commissioner did not even suggest that the clause was *invalid* for that reason. And, while respondent in one assignment of error raised the point in connection with errors assigned as to the method of computation of damages (R. f. 803), its argument was that the District Court had erred in its construction of the clause, viz., that damages were the difference between the invoice price of the entire shipment and the

market value, citing as authority *Pearse* v. *Quebec Steamship Co.*, 24 Fed. Rep. 285.

As will be observed from the opinion of the District Court, however, that court arrived at its determination that the invoice value of the "whole shipment" was the value upon which to compute damage, independent of and without any reference whatever to the words "entire shipment" as used in the clause (R. f. 770). The holding of that court, viz., that "the effect given similar clauses in the past has been that the damages are the difference between the invoice value of the entire shipment and the market value at time and place of destination of the goods in their actual condition" (R. f. 770), is certainly supported by the language used in the cases to which the court referred, viz.: *Gulf Colorado Ry.* v. *Texas Packing Co.* (*supra*); *The Oneida* (*supra*) at pages 692-693; *Duplan Silk Co.* v. *Lehigh Valley R. Co.* (*supra*).

There is nothing inherently objectionable or unjust in providing that loss and damage be adjusted on the basis of the invoice value of the entire shipment. Such an adjustment may operate to the advantage of the shipper quite as often as to that of the carrier. Indeed in some cases it is much more equitable, as in all it is certainly more convenient, to the shipper, to use the entire shipment as the basis. Consider, for an example, bulk shipments, such as grain. While the cargo may have been exposed to some damaging agent such, for instance, as wetting or heating, a substantial portion of it may, if it is carefully separated, be found to have suffered no actual or perceptible damage. Still, doubtless, the fact that this undamaged portion is a part of a shipment that has been damaged might affect the price for which the shipper could sell any portion of it. And, certainly, the inconvenience to the shipper in making the separation would constitute no small hardship. It would seem obvious, in such cases, that it would be far more just to the shipper to measure the damages on the basis of the invoice value

of the entire shipment. The same result might as well oftimes be true as to shipments in bags, cases or crates. The entire shipment may have been exposed to the damaging agent, yet in different or varying degrees, so that on complete separation a substantial part of the shipment would be found entirely undamaged. Here again, and for the same reasons pointed out above, ultimately it would probably prove more just to the shipper to use the invoice value of the entire shipment as the basis of adjustment.

Moreover, the result visualized by the Court of Appeals, as the effect of adjustment based on the invoice value of the entire shipment and condemning such adjustment, might as well occur when adjustment is based on the invoice value of merely the damaged part of the goods alone. Take, for example, the shipment here involved, viz., barrels of cherries in brine. The Commissioner found that the contents of approximately 1030 barrels (the figure including a few short delivered) were damaged in varying percentages (R. ff. 223, 729, 732). The damage suffered was a damage in value, the barrels containing both sound, shrivelled and broken cherries, all of which were used, but for different purposes (R. ff. 648-650). The Commissioner, however, for the purposes of convenience in figuring loss, converted these various damage percentages into destroyed cherries, which he computed as approximately 574 barrels (R. ff. 723, 729-732). Now, if we should assume that the 1030 damaged barrels constituted the entire shipment, and that their arrived value was equal to their invoice value plus freight (and there is no clear proof that they were not), the Circuit Court of Appeals would approve of precisely the same result as that which it has set forth as a reason for declaring the clause "unreasonable, contrary to public policy and void", viz., that "although a substantial part of the cherries were lost or damaged by the carrier's negligence it escaped liability because the arrived value of the (damaged) cherries in each shipment exceeded the

invoice value of the entire shipment (damaged cherries) plus prepaid freight" (Parenthetical expressions supplied).

There is, of course, no doubt that the true construction and application of a clause substituting *generally* invoice value for market value requires that in "arriving at the amount of damages" the commissioner "take the difference between this invoice price and the value" of the merchandise "at the time the same was delivered" at destination. That method was specifically in issue and specifically approved both by this Court in *Gulf Colorado Ry.* v. *Texas Packing Co.* (*supra*) at page 36; and by the Circuit Court of Appeals in *The Oneida* (*supra*) at pages 692-693.

We cannot believe that there is any moral question or any question of public policy involved that depends upon whether the contractual basis provided for adjustment of damages is the invoice value of the entire shipment or the invoice value of the lost and damaged portion of the shipment. Either method of adjustment may prove of advantage to the shipper and of detriment to the carrier, or *vice versa;* the difference in benefit or detriment being at most simply one of degree. And it is submitted that a question of public policy cannot arise on such a tenuous foundation.

The Circuit Court of Appeals did not cite any decision, and we believe none is to be found, that holds this clause invalid or against public policy. Some reliance, however, was placed on a *dictum* in *Pearse* v. *Quebec Steamship Co.* (24 Fed. Rep. 285, 288). The clause under consideration in that case provided that the ship owner "will not be liable for *more* than the invoice value of the goods". Under this clause (later definitely construed as a true limitation of liability clause and not one fixing an impartial measure of damages, *The Styria,* 101 Fed. 728, 734), the District Court held that the goods referred to were plainly the damaged goods and that damages were

to be ascertained by taking the difference between the invoice value of those goods and the value that was realized for them on sale. By way of *dictum* the court said that if the clause was to be construed as referring to both damaged and undamaged goods,

> "it would be void upon grounds of public policy, as unreasonable and as affording a direct encouragement to theft or non-delivery of the shipper's goods; for on every shipment, whether there was loss or not, the carrier might, without accountability, appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole, a result destructive of all commerce because enabling the carrier to appropriate all its profits."

This *dictum* shows on its face, it would seem, its own unsoundness. For, if the carrier steals or retains a part of the shipper's goods for its own benefit, it commits a larcenous act for which a criminal prosecution will lie. And clearly, in civil actions likewise the carrier can not "*without accountability* appropriate to his own use" any part of the "*owner's goods*". Any such act would obviously constitute conversion and deviation by the carrier, which would, despite such clause, not only make the carrier liable for the goods thus appropriated but also deprive him of any and all contractual benefits provided in the contract of carriage and render him an insurer without limit. (See *D'Utassy* v. *Barrett,* 219 N. Y. 420, 421; *Moore* v. *Duncan,* 237 Fed. Rep. 780, 782; *The Sarnia,* 278 Fed. Rep. 459, 466). It would seem obvious, therefore, that the *dictum* of the district judge in the above case offers no reasonable ground for declaring the clause here involved unreasonable and against public policy.

While the Circuit Court of Appeals has held that here the "contract exempts a carrier from liability for losses resulting from its negligence", it appears clear that

when the contract was entered into it did not provide for exemption from any real loss sustained by the shipper. The most that it could be said to provide for was an exemption from payment of *fortuitous profits* that might result from market fluctuation during transit, and for that exemption it gave the shipper compensating protection against *fortunitous losses* resulting from the same cause. Why should not carrier and shipper be free to enter into such a contract? What interest of the public is served in refusal to enforce it? This is not a case where any unfair advantage has been taken of the shipper. It knew the terms of the contract of carriage, assented to them and signed the contract. It made no protest against its terms at the time of shipment or subsequently prior to delivery of the goods. It not only did not protest the terms of shipment, but also presumably was satisfied and glad to avail itself of the protection afforded it thereby.

As a matter of fact the shipper was not, under the terms of the clause here involved, necessarily deprived of recovering even the fortuitous gain resulting from fluctuation in price between date of shipment and arrival at destination. As will be observed this clause is not limited simply to the addition to invoice value of freight paid or incurred, but provides instead for "adding expenses necessarily incurred" (R. f. 755). Since it is the invariable practice for the shipper to procure insurance on the goods shipped, as was done here (O. R., pp. 125, 154-155), it is reasonable to assume that the cost of procuring insurance was one of the necessary expenses guaranteed by the carrier. Thus the shipper was under this clause not only assured against any out of pocket loss by reason of fluctuating prices, but also of the expense of procuring insurance that would insure the recovery of any gain that otherwise would have resulted from like causes.

The shipper here has enjoyed the protection offered by the clause during the period of transportation, a protection that the common law did not provide for him. Hav-

ing enjoyed the benefit and protection offered by the clause during transportation, neither sound principles of justice nor public policy can justify the shipper's repudiation of his agreement under the clause after the event shows it to be to his interest to do so.

In *Hart* v. *Pennsylvania*, 112 U. S. 331, the bill of lading contained an agreed value or limitation clause and the shipper under it had enjoyed the benefit of a reduced freight rate in the shipment of his livestock. After transportation had been finished the interest of the shipper lay in, and he attempted, a repudiation of the limitation provision. In enforcing it, this Court said in part at page 341:

> "It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

We submit that there is no difference in principle between the *Hart* case and the one at bar. In the *Hart* case the shipper had under the clause enjoyed a reduced freight rate in transportation. Here the shipper under the clause had enjoyed protection against the possibility of an out of pocket loss resulting from a falling market. After the event of transportation in the *Hart* case it was to the shipper's interest to repudiate his agreement, just as here it was to the interest of the shipper after the event of transportation to repudiate its agreement. Benefit, although different in kind, was enjoyed by the shipper, in the one case as well as in the other, and repudiation, we submit, is no more permissible here than it was there.

As a result of the holding of the Circut Court of Appeals, petitioner has been deprived of the benefits of its contract entered into without fraud or sharp dealing and has been condemned to pay to respondent a large sum of money, all in the name of public policy.

Next to life and liberty no right has been considered more sacred or more jealously guarded from interference (under our form of government at least) than contract rights. Impairment of those rights by state or federal legislation has been provided against by Constitutional provision. While this inhibition, it is true, does not extend to the courts, we may not close our eyes to the reality that a judicial fiat that a contract is invalid on grounds of public policy is a form of legislation. And because it is a form of legislation that impairs or destroys contract rights we submit that a judicial decision, in a federal court at least, based on such grounds should receive the ultimate scrutiny of this court.

No more important question of general law could arise, it would seem, than one dealing with the subject of the validity of contract on grounds of public policy. It is a subject in which all the business world has a vital interest. That a public policy judicially established should be one of unquestionable wisdom would seem to go without saying. A legislatively established public policy may often have an emotional basis and will survive no longer than the emotion that sponsored it and the convening of another legislature. A judicially established policy on the other hand is one that must be grounded on principle; it is established for time.

For these reasons we submit that the petition for certiorari herein prayed should be granted, and this Court pass upon the wisdom of the policy declared below. We believe that at the least we have shown that the Circuit Court of Appeals arrived at its decision through reasoning of doubtful soundness and that it is not in harmony or consistent with the principle upon which

clauses of like nature have been upheld and enforced. We feel that we have established that the decision is untenable and in conflict with the great weight of authority including the authority of this Court; and that in any event the question is of such general interest and importance that it should now be authoritatively settled.

POINT II.

The Writ of Certiorari Here Prayed for Should be Granted to the End That the Decision of the Circuit Court of Appeals May be Reviewed and Reversed.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for Petitioner.

HOMER L. LOOMIS,
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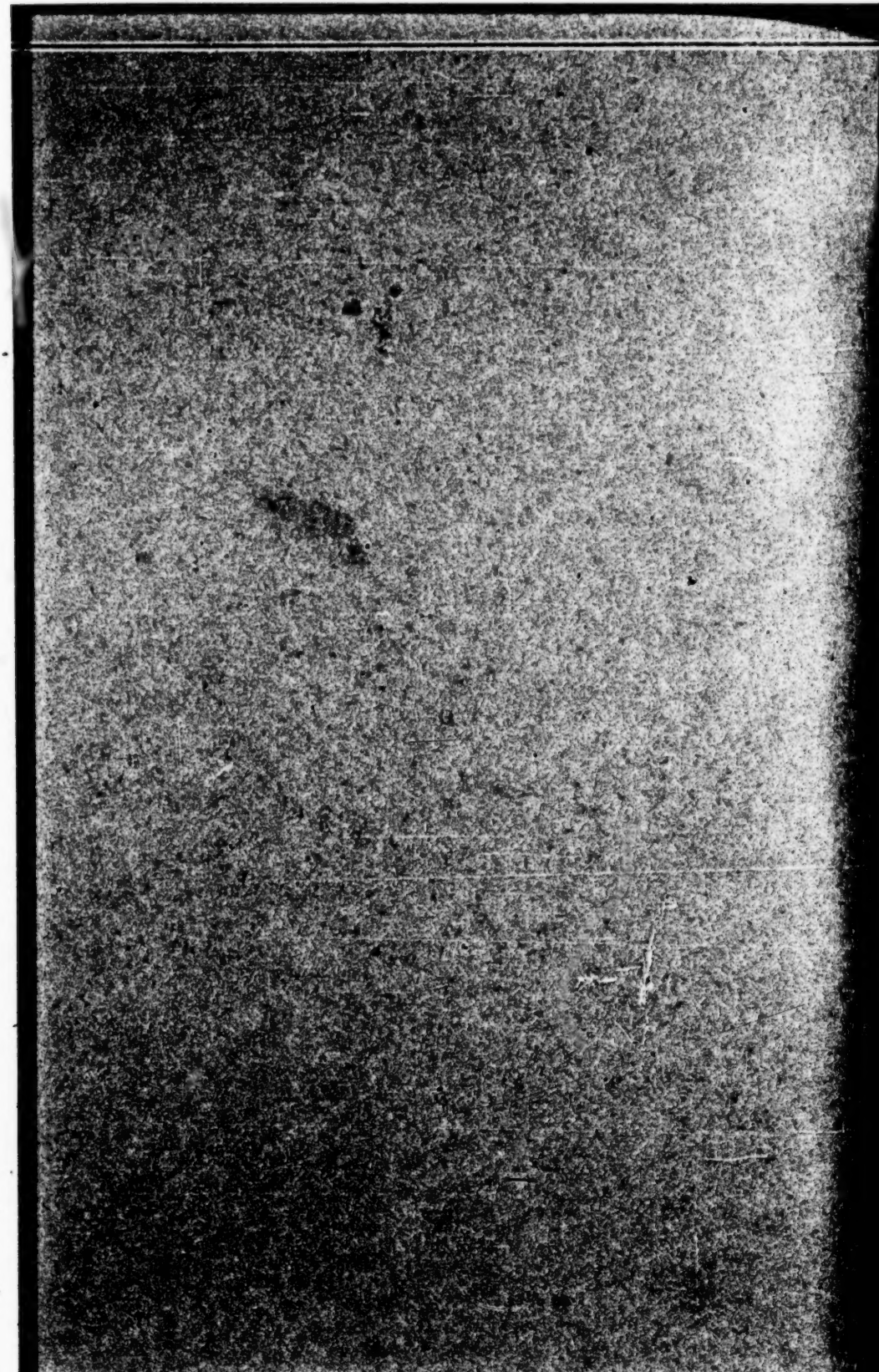

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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 521.

STEAMSHIP "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, CLAIMANT,

Petitioner,

against

THE RHEINSTROM BROTHERS COMPANY,

Respondent.

BRIEF FOR PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT.

HOMER L. LOOMIS,
Counsel for Petitioner,

HOMER L. LOOMIS,
REGINALD B. WILLIAMS,
On the Brief.

(6-7975) Printing Office, Inc., 154 Nassau St., New York, N. Y.

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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 521.

Steamship "ANSALDO SAN GIORGIO I",
SOCIETA NAZIONALE DI NAVIGAZIONE,
Claimant,
Petitioner,

AGAINST

THE RHEINSTROM BROTHERS COMPANY,
Respondent.

BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

I.

Official Reports of the Opinions Below.

The opinion of the Circuit Court of Appeals (R. pp. 193-197*) is reported in 73 F. (2d) 40 (Adv. Sheets). The report of the Special Commissioner (R. pp. 165-180) is unreported. The opinion of the District Court sustain-

* The reference (R.) found herein refers to the record herein; the reference (O. R.), for old record, refers to the record on appeal from the earlier interlocutory decree, which record constitutes Exhibit 3 in this record (R. p. 6) but by stipulation of counsel was not physically incorporated in the record in the Circuit Court of Appeals (R. f. 6) and in the record here (R. p. 279) and has been separately certified and filed herein as such exhibit in connection with this record (R. pp. 278-279).

ing petitioner's exceptions to the Commissioner's report (R. pp. 180-185) is reported in 3 F. Supp. 579. The memorandum opinion of the District Court dismissing the libel (R. 187) is not officially reported. The opinion of the District Court upon the trial of the merits (O. R. ff. 471-474) is not officially reported.

II.

Jurisdiction.

(1) The decree to be reviewed is that of the Circuit Court of Appeals, Second Circuit, dated and filed September 24, 1934, reversing the decree of the District Court (R. pp. 197-198). The petition for certiorari was filed November 7, 1934, and the order allowing the writ was granted and filed December 3, 1934 (R. p. 201).

(2) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C., Title 28, Section 347, and Article 3, Section 2, of the Constitution of the United States of America.

III.

Statement of the Case.

The petitioner steamship Ansaldo San Giorgio I is a vessel owned by claimant-petitioner Societa Nazionale di Navigazione, a corporation duly organized and existing under the laws of the Kingdom of Italy.

In response to a libel *in rem* filed by respondent (libellant) in the United States District Court for the Southern District of New York against said steamship, Societa Nazionale di Navigazione duly appeared as claimant and filed its answer to the libel.

The cause of action sued on arose in August, 1920 (R. f. 209, p. 149, O. R., f. 10). The libel, which was filed on March 1, 1922, (R. f. 1, p. 1), complained of damage to three lots of cherries in brine shipped in barrels and casks aboard the steamship Ansaldo San Giorgio I as follows: 2,955 barrels at Genoa for Philadelphia on July 17, 1920 (O. R. f. 6); 466 casks at Genoa for Philadelphia on July 17, 1920 (O. R. f. 8); and 845 barrels at Naples for New York on July 25, 1920 (O. R. f. 9). The complaint was that the cherries on arrival at destination were "not in like good condition as shipped", but were "short, seriously injured and damaged" (O. R. ff. 10-11).

The merits of the case were passed upon by District Judge Winslow and an interlocutory decree entered in the District Court in libellant's favor on October 20, 1927, and the matter referred to a Special Commissioner to assess the damage (O. R. ff. 476-477). This interlocutory decree was affirmed without opinion (26 F. (2d) 1016) and certiorari was denied (278 U. S. 633) on October 22, 1928 (R. f. 210, p. 150).

The respondent based its cause of action upon contract, as embodied in and evidenced by bills of lading (O. R. ff. 4, 9-10), which it introduced in evidence as its own exhibits (O. R. p. 141, Libellant's Exs. 1, 3). These bills which were all of the same general form and signed by both shipper and carrier contained a clause numbered "Eleventh" as follows:

> "ELEVENTH: In the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred" (O. R. p. 141, R. f. 274, p. 174).

The hearings before the Commissioner for the assessment of damages commenced on December 23, 1930 (R. f. 8, p. 5). At the first hearing various proofs were offered, including the old record on appeal and libellant's exhibits therein (R. f. 9, p. 6), which included photostats

of the three commercial invoices for the three lots of cherries (O. R. pp. 153, 154, 155, Lib. Ex. 7). At the end of that hearing both parties rested, briefs and reply briefs to be filed and exchanged, which was accordingly done (R. f. 11, p. 7). Following a lapse of approximately one year without a decision by the Commissioner, libellant moved to re-open the reference and put in further testimony, which motion was granted and the second hearing held on December 7, 1931 (R. f. 12, p. 8), at which time libellant put in evidence translations of the three commercial invoices which were in Italian (R. f. 14, p. 9). A further hearing was held on January 26, 1932, at which time libellant produced and examined two witnesses to prove market value, and thereupon rested for the second time (R. pp. 10-30).

At the re-opened hearing of December 7, 1931, libellant's counsel revealed for the first time what had happened to the three lots of damaged cherries, stating at that time that libellant itself had used them (R. p. 10). Accordingly, when libellant's counsel rested for the second time without bringing forward evidence through libellant's officers, of the monetary value realized by the latter from its use of the cherries, claimant's (petitioner's) counsel proceeded to Cincinnati and took the depositions of those officers, libellant's counsel attending and cross-examining the witnesses (R. ff. 212-229, pp. 151-165). That closed claimant's testimony.

The Commissioner rendered and filed his report on October 17, 1932 (R. pp. 3, 151). As appears by the report the Commissioner ruled in substance that clause "Eleventh" of the bills of lading, as set forth above, was a clause limiting liability and was invalid because there was no proof that the shippers had been offered a choice of rates (R. p. 172); that in consequence the measure of recovery was market value. The Commissioner then found that of the three lots of cherries shipped, the contents of 1030 barrels (or perhaps more accurately 1051 barrels, the

figure including 45 barrels short delivered) were damaged in varying percentages (R. pp. 173-174, 175, 176, 178). These damage percentages were not arrived at, however, by an actual separation of damaged from undamaged cherries. They were mere estimates by a cargo surveyor made from an examination of a couple of handfuls of a barrel's contents (R. p. 115) and agreeing with the consignee's representative as to amount (R. p. 104). The damage so found to have been suffered was a damage in value, the barrels containing sound, shrivelled and broken cherries, all of which were used by libellant but for different purposes (R. p. 155). The Commissioner, however, presumably for convenience in computing loss according to the measure he had ruled was applicable, converted these various damage percentages into barrels of destroyed cherries, reduced them to pounds and assessed damages as the total of the pounds so found times the market value per pound of sound cherries (R. pp. 173-176), plus interest (R. p. 178), the aggregate of which he found to be $26,006.99 (R. p. 178).

Exceptions were filed to the Commissioner's report (R. pp. 178-180), which were brought on for hearing in the trial court, and following extensive argument, oral and written, the court, after due consideration, sustained the exceptions in so far as they related to the Commissioner's ruling that clause Eleventh of the bill of lading was invalid and in so far as they related to the consequent erroneous method of assessing damage (R. pp. 180-185).

The basis of the District Judge's decision was that, since the invoice value of the whole shipment was the basis for computation of loss and damage in any event, irrespective of benefit or detriment that might result, whether to carrier or to shipper, and was not merely designed as a limitation to redound only to the carrier's benefit when the loss and damage would otherwise be larger, it constituted a convenient and reasonable rule for the assessment of damages; that it was fair and proper as

introducing an element of certainty into the calculations of the parties and as avoiding the risks of more or less unpredictable fluctuation of the market; that it was fair and equitable since it was equally binding upon both and might prove quite as beneficial to one as to the other; that therefore it needed no special consideration such as choice of rates to support it (R. pp. 182-184). In applying clause Eleventh the District Judge treated it as providing a new measure of the damages, which thereunder were to be computed by determining the amount by which the invoice value of the whole shipment exceeded the arrived or damaged value of the shipment (R. pp. 184-185).

A further hearing was then held before the District Judge pursuant to direction to determine whether and to what extent the entire invoice value plus expenses exceeded the arrived value of the shipment. The result of that hearing was that there was found to be no such excess, that the libellant consequently had not suffered damage and that the libel was ordered dismissed (R. pp. 186, 187).

From the order so dismissing the libel, libellant appealed to the Circuit Court of Appeals, assigning as error in substance the holding of the court that clause Eleventh was reasonable and valid; failure to hold that it was invalid because there was no proof of an offer of alternative rates; and the holding that under clause Eleventh the libellant's damages were the difference between the invoice value of the entire shipment and the arrived market value of the entire shipment, both damaged and undamaged (R. pp. 189-191).

Decision of Circuit Court of Appeals.

The Circuit Court of Appeals reversed the decree of the District Court and ordered that libellant recover damages as found by the Commissioner (R. p. 277). In its opinion the court held in substance that a mutual agreement to

accept the invoice cost of the damaged goods as the measure of their value in sound condition at destination "may be of advantage to either party" and is a salutary provision; that clause Eleventh in the bill of lading, however, "does not substitute invoice value for market value of the goods lost or injured", but "the invoice value of the entire shipment"; that to use the latter standard as the measure of damages here would, by reason of market conditions existing on the date of delivery, allow the carrier to "escape liability" for the loss and damage caused by its negligence; and that "a contract which would thus exempt a carrier from liability resulting from its negligence is so unreasonable that it must be held contrary to public policy and void" (R. p. 196).

The Circuit Court of Appeals in its opinion gave no consideration to the benefit to the shipper and the detriment to the carrier that would have resulted had the arrived value of the cherries by reason of market conditions been different; it gave no consideration to the protection against a possibility of an out of pocket loss that the clause gave and the shipper enjoyed during the transit of the goods, a protection not afforded by the common law. In other words, that court gave no consideration whatsoever to the protection against possible loss enjoyed by the shipper by reason of this clause. It gave no consideration to the advantages to the shipper and the detriment to the carrier that might result from its application, which, as held by the District Judge, was a test of its reasonableness and fairness. The court did not analyze the clause abstractly as had the District Court to determine whether its provisions were reasonable as mutually protective. Instead the court measured the reasonableness of the clause only by the result of its application under the peculiar circumstances and market conditions obtaining at the time of the delivery of the shipment in this particular case.

IV.

Specifications of Error.

The Circuit Court of Appeals erred in the following respects:

1. In holding that clause "Eleventh" of the bills of lading is unreasonable and contrary to public policy.

2. In holding that clause "Eleventh" of the bills of lading is void.

3. In holding that clause "Eleventh" of the bills of lading exempted the carrier from its negligence.

4. In reversing the decree of the District Court dismissing the libel and ordering that respondent recover damages as found by the Commissioner.

V.

Argument.

Summary of Argument.

A common carrier "may modify his common law responsibility by special contract" where such contract is not unreasonable and is assented to by the shipper (*Cau* v. *Texas Pacific Ry. Co.*, 194 U. S. 427, 430-431). A stipulation in a bill of lading that claims for loss or damage shall be adjusted or computed on the basis of the invoice value of the property, the subject of shipment, plus prepaid freight, is a special contract substituting a new measure of damages for the measure that would ordinarily prevail (*Gulf, Colorado Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 37; *Pennsylvania R. R. Co.* v. *Olivit Bros.*, 243

U. S. 574, 586). Such modification of liability is controlling (*Phoenix Ins. Co.* v. *Erie Transportation Co.* (117 U. S. 312, 332) and enforceable (*Gulf, Colorado Ry. Co.* v. *Texas Packing Co., supra; The Oneida,* 128 Fed. Rep. (C. C. A. 2d) 687, 692), even although the carrier has not presented the shipper with the actual alternative of selecting under which liability he will ship his goods (*Cau* v. *Texas Pacific Ry. Co., supra*). Clause "Eleventh" in the bills of lading herein, which provides that claims for loss or damage shall be adjusted on the basis of the invoice value of the entire shipment, is a modification of the carrier's common law liability in that it substitutes a contractual measure of damages for the measure that would ordinarily prevail. It is of the same type as those under consideration and enforced in *Gulf, Colorado Ry. Co.* v. *Texas Packing Co.* and *The Oneida* (*supra*) and has been held valid and enforceable by the great weight of authority in the state courts without the tender of an alternative freight rate (*The Ansaldo San Giorgio I,* 3 Fed. Supp. 579, 581, and cases cited). It meets the tests as to validity stated in *Cau* v. *Texas Pacific Ry. Co.* (*supra*). The bill of lading containing it is signed by both shipper and carrier (O. R. p. 141). It is not operative exclusively in the interest of the carrier; and is equally binding on both (*The Oneida, supra*). It guards the parties against unpredictable fluctuations in the market while the goods are in transit, furnishes a ready and convenient standard to measure loss and may frequently work out to the benefit of the shipper and the detriment of the carrier (*Chicago etc. Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97, 99; *The Oneida, supra, The Ansaldo San Giorgio I, supra*). The clause "has no tendency to exempt from liability for negligence". For like the limitation or agreed value clause "it does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on" (*Adams Express Co.* v. *Croninger,* 226 U. S. 491, 510). Enforcement of it does not violate public policy. On the other

hand failure to enforce it conflicts with public policy, is repugnant to the soundest principles of fair dealing and freedom of contract, and rewards the shipper for a form of deceit by allowing him to repudiate the contract after the event shows it to have been to his advantage to do so (*Hart* v. *Pennsylvania,* 112 U. S. 331, 341).

Division of Points of Argument.

At the outset of the consideration of the question here presented it is to be observed that there have been three separate judicial appraisals of the agreement here under consideration, all of which differ among themselves either in the results arrived at or in the premises on which such results are predicated.

The special commissioner ruled that the agreement is one limiting the carrier's liability and that it is invalid because "there was no proof that the shipper was offered an alternative freight rate under which the carrier's liability would be unlimited" (R. p. 195). The District Court held that the agreement "is not a limitation clause at all but is a provision fixing a new measure of damages * * * and may work out to the benefit of the shipper and the detriment of the carrier * * * and is reasonable and valid without the offer of an alternative rate". (R. p. 183). The Circuit Court of Appeals held that the clause "does not substitute invoice value for market value of the goods lost or injured * * * that the invoice value of the entire shipment, not the invoice value of the lost or damaged goods, is to constitute the basis for computing whether damages have been sustained"; that to give the clause such effect in the present case the carrier would pay nothing for a loss and damage caused by its negligence; and that "a contract which would thus exempt a carrier from liability for losses resulting from its negligence is so unreasonable that it must be held contrary to public policy and void" (R. p. 196).

In view of these different constructions, different considerations and different conclusions as to the reasonableness and validity of the clause, we believe it will be appropriate to consider the reasonableness of the clause in the light of existing precedent exclusive of and prior to a consideration of the soundness of the reasons advanced by the Circuit Court of Appeals for holding the clause to be unreasonable and contrary to public policy. We will therefore consider in the order indicated (1) the validity of the agreement as a modification of the carrier's common law responsibility and the invalidity of objections urged against it by respondent; (2) the insufficiency of the reasons set forth by the Circuit Court of Appeals on which it predicated its holding that the agreement is unreasonable, contrary to public policy and void.

POINT I.

The agreement mutually binding on shipper and carrier to adjust claims for loss and damage on the basis of the invoice value of the entire shipment plus expenses merely substitutes a fair conventional measure of damages definite and certain as to amount for the measure indefinite and uncertain in this respect that would otherwise govern and is a reasonable modification of the carrier's common law responsibility.

The respondent's attack upon the clause both in the District Court and in the Circuit Court of Appeals was upon the grounds advanced by the commissioner for holding it invalid, viz.: That it was a provision limiting the carrier's liability and that there was no proof that the shipper was offered an alternative freight rate under which the carrier's liability would be unlimited (R. pp. 189-190). The cases cited by respondent in the court below in support of the contention of invalidity based on the

absence of an offer of alternative freight rates were all cases involving a limitation of liability clause.

That the clause here under consideration is not such a clause is fairly evident, we believe, from a mere reading of the same. It does not purport to limit liability. It is not phrased in words "which are words of limitation", words which distinguish such clauses from others, such, for instance, as agreed valuation clauses (*The Caledonier*, 42 F. (2d) 856, 857). Furthermore, as pointed out in *The Merauke*, 31 F. (2d) 974, 975, a limitation of liability clause "attempts to say that the shipper shall not recover the full measure of the loss he has sustained", and is not at all what we have here, viz.: A mutual covenant "agreeing to accept the invoice cost (plus expenses) as the measure of the value of the goods at port of destination". (See *The Merauke, supra*).

It would seem too clear for argument that the clause here involved does not "attempt to say that the shipper *shall not* recover the full measure of the loss he has sustained". On the contrary, under this clause the shipper not only is *not excluded* from recovering the full measure of his loss, even as measured by the yardstick of the common law, but also he may recover under it an amount greater than his loss as measured by that law. As was said by this Court in *Chicago etc. R. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99, of a bill of lading clause which, as respondent conceded in its brief below, "was of the same type as that presented here":

> "We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it *does not necessarily prevent a recovery of the full actual loss,* and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule." (Italics supplied).

The construction of the clause as thus given is, it would seem, entirely inconsistent with the definition of a limita-

tion of liability clause as laid down in *The Merauke,* (*supra*). We submit that the intent manifest from its wording, both as a matter of reasonable construction and as a matter of precedent, negatives it as an attempt merely to limit the carrier's common law liability, but establishes it as an agreement fixing a new measure of damages equally binding on carrier and shipper.

It was the sustained contention of respondent below, however, in substance at least, that, under the decisions of this Court there cited and relied upon as authorities on measure of damages, a shipper must always be actually presented with the opportunity to select under which, the common law measure or one varying that measure, he will ship his goods. We do not so understand the rule, even where the provision involved is a true limitation of liability clause. In *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427, 430-431, this Court said:

> "But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an 'option and opportunity must be given to the shipper to select under which, the common law or limited liability he will ship his goods.'
>
> If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 344, and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. *Railroad Co.* v. *Lockwood,* 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174.

> Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed."

It seems to us the test of validity here stated is not whether an alternative is actually presented to the shipper to ship under a liability measured by the common law rule but rather whether the measure of liability under which the goods are shipped is one assented to by the shipper, and whether it is reasonable. The clause here involved, we submit, meets both these tests. That the shipper knew of, and assented to, this clause is apparent from an examination of the bills of lading containing the clause, *which are signed by the shipper as well as by the carrier* (O. R. pp. 139, 141), and there is no evidence whatsoever of a protest against or an objection to it, either at the time of shipment or subsequently. That the clause is reasonable would seem to appear upon its face, securing, as it does, the shipper against an out of pocket loss by reason of fluctuations in market during transit and furnishing a ready and convenient standard for measuring loss in case of damage.

Respondent cited and relied upon in the lower court the following cases in this court as supporting its contention that the clause here under consideration is invalid, viz.: *Hart* v. *Pa. R. R. Co.* (112 U. S. 331); *Union Pacific R. R. Co.* v. *Burke* (255 U. S. 317); *Adams Express Co.* v. *Croninger* (226 U. S. 491); *Boston & Maine R. R. Co.* v. *Piper* (246 U. S. 439); *American Railway Express* v. *Lindenburg* (260 U. S. 584); *Kansas Southern Ry. Co.* v. *Carl* (227 U. S. 639). While it is true that in most of those cases clauses limiting liability to a stated value were held to be valid where the shipper had the option to ship under a rate preserving the unlimited common law liability of the carrier, we do not believe that the process of reasoning by which this Court arrived at its determination sus-

taining such a limitation under such circumstances justifies a conclusion that such an alternative was laid down as a condition for sustaining it. We believe that it fairly appears from the reasoning of those cases, at least when rationalized with the rule stated in others, that the basis for sustaining the limitation was that it was under the circumstances a reasonable provision, and that the option offered the shipper to ship under full liability was clear evidence of its reasonableness.

We are strengthened in this view by the decisions of this Court that have sustained other limitations of common law liability in the absence of an option offered of shipping without such limitation. Such limitations so sustained include among others the following, viz.: One providing exemption from liability for damage from various excepted causes (*Clark* v. *Barnwell,* 53 U. S. 272); a limitation exempting for loss occasioned by fire (*York Company* v. *Central Railroad,* 3 Wall. 107; *Bank of Kentucky* v. *Adams Express,* 93 U. S. 174); one limiting liability upon through shipments to losses occurring on carrier's own line (*Railroad* v. *Pratt,* 22 Wall. 123); a provision that in case of loss the carrier shall have the benefit of any insurance effected upon the goods (*Phoenix Ins. Co.* v. *Erie & Western Transp. Co.,* 117 U. S. 312); a provision exempting the carrier from action for loss and damage unless the shipper file notice of claim for loss or damage within a defined time (*Express Co.* v. *Caldwell,* 21 Wall. 264; *Queen of the Pacific,* 180 U. S. 49). These and kindred limitations and variations of common law responsibility are sustained because they are reasonable, not because of any option offered to the shipper to ship without such a limitation of the carrier's common law liability.

We believe therefore that the governing rule to be evolved from the cases in this Court is, that, in determining the validity of any provision which limits the carrier's all responsibility at common law, the test to be applied is the reasonableness of the limitation; and that this rule

applies to a limitation of the common law liability in case of loss or damage just as it applies to other limitations of the carrier's common law responsibility.

However, even if it may be said that under the decisions of this Court an opportunity to ship under alternative rates is a condition for sustaining a provision limiting liability in case of loss, the clause under consideration here, as pointed out above, is not such a provision. And the respondent did not below, and we submit cannot here, cite any decision in this Court holding such a clause unreasonable, although in *Chicago etc. Ry. Co.* v. *McCaull-Dinsmore Co.* (*supra*) the Court, despite its favorable consideration, felt compelled to hold it unenforceable as to interstate shipments by reason of the command of an amendment to the Cummins Act. On the other hand, where the clause has received this Court's consideration, as we shall later point out, and where its judgment has not been bounded by legislative enactment, it has received the Court's approval.

It is true, of course, that an agreement that exempts a carrier from its negligence is unreasonable and, as said by respondent in its brief below, such an agreement is no more valid because it rests upon consideration than if without consideration (*Kansas Southern Ry.* v. *Carl*, 227 U. S. 639, 650). And, where, as in *Boston & Maine R. R.* v. *Piper* (*supra*), the agreement is not a limitation upon the amount of recovery or one "limiting liability to an agreed valuation" but one which expressly "attempts to limit the carrier's liability for negligence", it is invalid although the shipper was given a reduced freight rate. But the mere fact that the effect of a provision may be to alter the ultimate financial responsibility of the carrier or recovery of the shipper does not give it the character of exempting the carrier from its negligence. Even a clause limiting the carrier's liability to an arbitrary amount bearing no relation to actual value is valid (*Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 285), because it is rea-

sonable for the carrier to measure its responsibility in relation to rate charged (*Adams Express Co.* v. *Croninger*, 226 U. S. 491, 510) and such limitation "has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on" (*Adams Express Co.* v. *Croninger* (*supra*)).

In the absence, therefore, of a provision that in terms expressly or impliedly exempts the carrier from the results of its negligence, the determination of whether a given clause does or does not contravene public policy must rest, in the last analysis, as it seems to us, upon its fairness and reasonableness under the circumstances (as, for example, whether it may prove of benefit to the shipper and of detriment to the carrier, as well as the reverse) and not upon the fact that it may alter the ultimate financial responsibility of the carrier or recovery of the shipper where the carrier has been negligent. We are brought again, therefore, to a consideration of the reasonableness of the clause here under consideration, which admittedly alters the common law responsibility of the carrier by substituting a new measure of damages where loss and damage occur.

As introductory and persuasive reasoning in support of the reasonableness of the clause, we cannot better the cogent and, as we believe, sound analysis of it set forth in the opinion of the District Court, where that Court said: (*The Ansaldo San Giorgio I* (3 F. Supp. 579, 581, R. pp. 182-183)):

> "There is a substantial difference between an agreement that damages shall be adjusted on the basis of invoice value and an agreement that in case of damage no value higher than the invoice value shall be allowed. The latter is a strict limitation agreement, operative only in favor of the carrier who may always disregard its presence and show that the market value at destination was less than the invoice value and take advantage of that fact. The former is not a limitation

clause at all, but is a provision fixing a new measure of damages. In instances where the market price of the commodity drops between the time of shipment and the time of arrival at destination, the clause may work out to the benefit of the shipper and the detriment of the carrier. The difference was noted in the *Merauke* Case (*The Merauke,* 31 F. (2d) 974) and in the *Kilthau* Case, (*Kilthau* v. *International Mercantile Marine Co.,* 245 N. Y. 361,) and the intimation in both opinions is that a provision for computing damages by reference to invoice value is reasonable and valid without the offer of an alternative rate bearing unlimited liability.

The fact is that such a clause is not unreasonable or offensive to public policy, and on principle should be treated as valid. It does not place an artificial or arbitrary value on the goods. It guards the parties against fluctuations in the market while the goods are in transit. It furnishes a ready and convenient standard for measuring the loss in case of damage, and tends to promote prompt settlements by leaving no room for extravagant claims of market value at destination. As already observed, it is not exclusively in the interest of the carrier, but may frequently confer benefit on the shipper."

It was the expressed opinion of respondent below, shared apparently by the Circuit Court of Appeals, that although the clause had been held valid by the state courts without an offer of alternative rates, its validity under such circumstances did not seem to have been squarely decided by the federal courts. We submit that on principle and in substance the federal courts have squarely decided the question and upheld the validity of the clause. In *Phoenix Ins. Co.* v. *Erie Transp. Co.* (117 U. S. 312, 322), this Court, defining the limits of the rights under subrogation of a cargo insurer in an action brought by the latter against the carrier, said:

"any lawful stipulation between the owner and the carrier of the goods, limiting the risks for which the carrier shall be answerable, or the time of making

> the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier; * * * So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in *Mobile & Montgomery Railway* v. *Jurey,* 111 U. S. 584."

In *The Oneida,* 128 Fed. (C. C. A. 2nd) 687, the bill of lading contained the following clause (p. 689):

> " 'In ascertaining the amount of such damage, the same shall be computed at the value or cost of the said goods or property at the time and place of shipment.' "

In that case, involving damage to the goods carried, Judge Wallace, considered the effect of the clause and, after pointing out that its language is more consistent with the meaning "that as a basis for computing the damages their cost or value at the place of shipment is to be substituted for their market value at the place of destination", continued at page 692:

> "The clause was probably inserted for the benefit of both parties, and to relieve either from the chances of an excessive loss arising by abnormal fluctuations in the market value of the goods occurring after the time of shipment, and whereby the market value at the time of delivery might be much higher or much lower than at the time of shipment, or than ordinarily. * * * Under a bill of lading like the present the shipper's loss is fairly measured by the difference between the cost or value of the goods at the time and place of shipment and their value in their damaged condition at the place of delivery, together with the expenses incurred for their transportation."

In *Duplan Silk Co.* v. *Lehigh Valley R. Co.,* 223 Fed. Rep. 600, Judge Hough, in delivering the opinion of the

District Court, quoted in the affirming opinion of the Circuit Court of Appeals, said, referring to the decision in *The Oneida,* (*supra*), relative to the construction of the clause:

> "It was held to be a conventional substitution of the former value for the latter; the shippers were estopped from using or claiming the higher value, which was the real value."

In *Gulf, Colorado Ry.* v. *Texas Packing Co.,* 244 U. S. 31, this Court had before it a clause similar to the one here under consideration. The clause as set forth at page 36 read as follows:

> " 'The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.' "

This Court, speaking by Mr. Justice Day in holding that the clause changed the rule of damages otherwise applicable, said at page 37:

> "Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. *New York, Lake Erie & Western R. R. Co.* v. *Estill,* 147 U. S. 591, 616. The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damages."

In holding the clause enforceable, and construing the manner of its application, Mr. Justice Day further said at page 36:

> "The testimony showed that the invoice price of the poultry at Temple to the Packing Company was $22,238.56, and that the poultry was worth at least that sum at Temple at the time of shipment. We think that in taking this sum as the basis of computing damages the trial court did but enforce the stipulation in the bills of lading. That sum was the *bona fide* invoice price to the consignee, which the bills provided was to be the basis of recovery in case of loss or damage. We think the court properly charged the jury to take the difference between this invoice price and the value of the poultry at the time the same was delivered in Chicago in arriving at the amount of damages. No question is raised in this case as to the right of the plaintiff to recover also the freight paid. See *Pennsylvania R. R. Co.* v. *Olivit Bros.*, 243 U. S. 574."

The same type of clause had been before this Court in *Pennsylvania R. R. Co.* v. *Olivit Bros.*, 243 U. S. 574, 586, and the provision therein relative to the inclusion of freight charges affirmatively enforced against the carrier.

In neither of these cases, nor in *The Oneida, supra,* was there any suggestion that the enforceability of the clause was dependent upon the carrier's having offered the shipper alternative freight rates. And the reasoning both in the *Gulf, Colorado* case in this Court and in *The Oneida* in the Circuit Court of Appeals, particularly in the latter, negatives the presence of any such choice of rates as the reason for enforcement, and places it upon the entirely different grounds set forth as quoted above.

In the state courts the great weight of authority supports the clause as reasonable without an offer of alternative freight rates. As was pointed out by the District Court (*The Ansaldo San Giorgio I, supra,* at page 581, R. ff. 764-765):

> "There is abundant authority for the proposition that the clause as it stands is valid. For years the

cases have been to the effect that a clause in a bill of lading that loss shall be computed on the basis of the invoice price of the goods is valid, although no alternative rate was tendered the shipper or other special consideration given. *Coleman* v. *New York, New Haven & Hartford R. Co.*, 215 Mass. 45, 102 N. E. 92, 7 A. L. R. 1366; *Fahey* v. *Baltimore & Ohio R. Co.*, 139 Md. 161, 114 A. 905; *Davis* v. *Zimmern*, 211 Ala. 63, 99 So. 307; *Grubbs* v. *Atlantic Coast Line R. Co.*, 101 S. C. 210, 85 S. E. 405; *Brockman Commission Co.* v. *Missouri Pacific R. Co.*, 195 Mo. App. 607, 188 S. W. 920; *Denver, etc., R. Co.* v. *Peterson Grocery*, 59 Colo. 125, 147 P. 663; *Wallingford Bros.* v. *Atchison, etc. R. Co.*, 101 Kan. 544, 167 P. 1136, L. R. A. 1918B, 716; *Bowman-Kranz Lumber Co.* v. *Bush*, 104 Neb. 165, 176 N. W. 91; *J. C. Shaffer Co.* v. *Chicago, etc., R. Co.*, 21 I. C. C. 8."

In its brief in the Circuit Court of Appeals respondent conceded that all but four of the above cases cited by the District Court upheld the clause as valid without a "choice of rates * * * and appear to support the reasoning of the District Court".

That these cases and others that may be cited do support the reasoning of the District Court can hardly be doubted. A review of the state court cases, or even a major portion of them, however, is not within the compass of this brief, and we will confine ourselves to a reference to only two or three from widely separated jurisdictions.

In *Grubbs* v. *Atlantic Coast Line R. Co.*, 85 S. E. 405, 101 S. C. 210, the bill of lading contained a clause similar to that before this Court in the *Gulf, Colorado* case (*supra*). The Supreme Court of South Carolina, in reversing the decision of the Circuit Court holding the clause unenforceable because not supported by the consideration of a reduced freight rate, said at page 405:

"The bill of lading does not show that there was an agreement that, in consideration of a reduced rate of shipment, the amount of recovery in case of loss would be limited to a specified amount. On the contrary,

the language of the bill of lading negatives any such agreement. The provision in the bill of lading was merely intended to establish a rule for determining the value of the property in case of loss, irrespective of the fact whether it was greater at the point of shipment or destination, which could not be foreseen, on account of the fluctuation in prices. It was for this reason that such a rule was upheld in *Matheson* v. *Railway*, 79 S. C. 155, 60 S. E. 437, which is conclusive of this case. It will thus be seen that the principle announced in the case of *Johnstone* v. *Railroad Co.*, 39 S. C. 55, 17 S. E. 512, is not applicable."

In *Denver & R. G. R. Co.* v. *Peterson Grocery Co.*, 147 Pac. 663, 59 Colo. 125, the bill of lading also contained a clause similar to the one in the *Gulf, Colorado* case (*supra*). In reversing a judgment for the plaintiff because of error in instruction as to damages, the Court said at pages 664-665:

"Plaintiff's proof on this question (damages) was limited to the market value at the time and point of destination. The defendant offered no testimony on the subject. By instruction 7 the jury were told, in substance, that if they found for the plaintiff, its damages should be computed on the basis of the value of the property at the point of destination. Exceptions were taken to this instruction. It does not appear that this clause in the bill of lading was supported by a reduced freight rate or other special consideration, and, in the absence of such evidence, we must assume that it was not. * * *

In *Pierce* v. *So. Pac. Co.*, 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350, the contract made the invoice price at the point of shipment the measure of damages. It was sustained, but there was added as an element of damage the freight actually paid and interest on the whole amount.

In volume 4, Elliott on Railroads (2d Ed.) § 1510a, volume 5, Am. & Eng. Ency. of Law (2d Ed.) p. 335, volume 6, Cyc. p. 401, and volume 1, Hutchinson on Carriers (3d Ed.) § 430, the conclusion stated on this subject, in substance, is that the great weight of authority supports the validity of such stipulations

where they have been freely and fairly entered into, whether the loss be the result of the carrier's negligence or not, and that it does not require a reduced freight rate to sustain it. This conclusion appears to be supported by many of the later decisions. *Spada* v. *Penn. R. Co.* (N. J.) 92 Atl. 379; *Inman & Co.* v. *Seaboard Air Line Ry. Co.* (C. C.) 159 Fed. 960; *Central of Ga. Ry. Co.* v. *Murphey & Hunt*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Tibbits* v. *R. I. & P. Ry. Co.*, 49 Ill. App. 567; *Davis* v. *N. Y., Ont. & West. Ry. Co.*, 70 Minn. 37, 72 N. W. 823; *101 Live Stock Co.* v. *K. C. & M. B. Ry. Co.*, 100 Mo. App. 674, 75 S. W. 782; *C., R. I. & P. Ry. Co.* v. *Harmon*, 17 Ill. App. 640; *Boscowitz* v. *Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Matheson* v. *So. Ry. Co.*, 79 S. C. 155, 60 S. E. 437; *Gratiot St. Warehouse Co.* v. *M., K. & T. Ry. Co.*, 124 Mo. App. 545, 102 S. W. 11.

This clause was included in a uniform bill of lading recommended by the Interstate Commerce Commission in 1908. 14 Interst. Com. Com'n R. 346. It has since been held valid by that tribunal in an interstate shipment in a case where the loss was occasioned through the negligence of the carrier. *Shaffer & Co.* v. *C., R. I. & P. Ry. Co.*, 21 Interst. Com. Com'n R. 8.

In the case last cited there was a total loss to the consignee, for which reason the payment of freight at the point of destination did not enter into the computation. While this court has never passed directly upon this question, a detailed discussion of it could add but little to what has been said *pro* and *con* in the cases cited, for which reason we will not undertake it, but dispose of it by saying that, as it appears to be recognized as valid in interstate shipments, and also has been held reasonable and valid when fairly and freely entered into by a majority of the state courts which have heretofore passed upon it in intrastate shipments, we are of opinion that we should adopt the conclusion of the majority, and hold it valid so far as it is applicable, until the Supreme Court of the United States declares otherwise, or until further legislation is enacted on the subject."

In *Davis* v. *New York, O. & W. Ry. Co.*, 72 N. W. 823, 824, 70 Minn. 37, cited with approval by this Court in

Penn. R. R. Co. v. *Olivit Bros.* (*supra*), in holding enforceable a clause substituting the value of the goods at point of shipment without providing for the addition of transportation costs as the measure for computing damages, the Court said:

> "The bill of lading introduced in evidence * * * contained a stipulation that the amount of any loss or damages for which any carrier became liable should be computed at the value of the property at the place and time of shipment, unless a lower value had been agreed upon. * * * Upon reflection and consideration we are of the opinion that, in a condition of this nature, there is nothing which excludes from a computation of damages, such sums as may be paid or incurred by a consignee as transportation charges. The condition is simply that the amount of any loss or damage shall be estimated and fixed at the value of the property at the time and place of shipment, and, in the absence of such special contract, the measure of damages is settled by the value at the place of destination, charges for transportation entering into the computation. * * * *If transportation charges paid or incurred by or on behalf of the consignee, or earned by the carriers, but not paid, are to be taken into consideration, we cannot say that the condition is on its face unjust, unreasonable or opposed to public policy.*" (Italics supplied.)

In the case at bar, it is to be remembered, it was *expressly* provided that all such transportation and other charges necessarily incurred should be included in the value of the merchandise.

The respondent contended below that in four of the cases cited by the District Court there was no discussion of, and that it does not appear, "whether or not there was a choice of freight rates". We think, however, that it does appear from the opinions in those cases that the clause was upheld because reasonable, without any reference to or dependency upon a choice of rates. For instance, in *Davis* v. *Zimmern*, 211 Ala. 63, 99 Southern

307, one of the cases referred to by respondent, the reasoning of the court, in sustaining the clause, is quite inconsistent with the necessity of a choice of rates as a condition of its validity. In that case a clause similar to the one under consideration in the *Gulf, Colorado* case (*supra*) was involved. The Court, quoting from one of its own previous decisions, viz., *South. Ry. Co.* v. *Cofer*, 149 Ala. 565, said:

> "* * * It will be observed that no exemption from liability on account of negligence is involved in this stipulation, but the sole effect of it is to fix the place at which the price of the cotton shall be ascertained in respect to the measurement of damages. It has been held that such stipulations in bills of lading are reasonable and enforceable. * * *"

The decision there was that the stipulation, being reasonable and enforceable on its face, was applicable to loss from the carrier's negligence, and required no special consideration to support it. * * *

Dealing with this identical stipulation, the following cases hold it as valid and enforceable against negligent loss or injury, *and without any special consideration—as a reduced freight rate—to support it:* (*Denver, etc. R. Co.* v. *Peterson Co.*, 59 Colo. 125, 147 Pac. 663; *Gratiot St. W'house Co.* v. *M., K. & T. Ry. Co.*, 124 Mo. App. 545, 102 S. W. 11; *Wallingford* v. *A. T. & S. F. Ry. Co.*, 101 Kan. 544, 167 Pac. 1136, L. R. A. 1918B, 716; *Bowman-Kranz Lbr. Co.* v. *Bush*, 104 Neb. 165, 176 N. W. 91; *F. W. Brockman, etc., Co.* v. *Mo. Pac. Ry. Co.*, 195 Mo. App. 607, 188 S. W. 920; *Coleman* v. *N. Y., etc., R. Co.*, 215 Mass. 45, 102 N. W. 92, 7 A. L. R. 1366; *Grubbs* v. *A. C. L. R. R. Co.*, 101 S. C. 210, 85 S. E. 405; *Inman* v. *S. A. L. R. Co.* (C. C.) 159 Fed. 960).

In *Wallingford* v. *Ry. Co.*, *supra*, the Kansas court said:

> 'In our opinion the measure of damages as fixed by the contract is reasonable, valid and controlling. The provision is intended to establish a rule for determining the value of the property in the event of loss and not, as plaintiffs contend, to limit or diminish the carrier's liability'.

And in *Coleman* v. *N. Y., etc., R. Co., supra,* the Massachusetts court said:

> 'It was a reasonable contract to base the damages to be recovered in case of loss upon the genuine and honest invoice price between the parties. There is nothing contrary to public policy in such a contract.' * * *
>
> We conclude that, upon sound principle, as well as upon settled authority, the stipulation in the bills of lading here presented is valid and binding, and must be given effect according to its terms." (Italics supplied.)

The state court case chiefly relied upon below by respondent was *Ruppel* v. *Alleghany Valley R. R. Co.,* 31 Atl. Rep. 478. In that case the Supreme Court of Pennsylvania held invalid, as one limiting liability, a bill of lading clause which provided that loss or damage "shall be computed at the value of property at the time and place of shipment". The court held that this provision was "palpably a limitation of or reduction on the loss of the shipper. The sole inducement to shipment of marketable commodities is the higher price at point of destination".

The Pennsylvania court's conclusion as to the invalidity of the clause, it is apparent, is based on two assumptions, both of which, it is submitted, are untrue in fact. Contrary to the first assumption, it is common knowledge that, as, it will be observed, the courts in a number of the above cited cases judicially noticed, due to market fluctuation during transit the goods are often of less value at destination than at point of shipment. The second assumption, viz., that the sole inducement to shipment is a higher price at point of destination, is equally untrue in fact. As often as not goods are consigned by shippers from one port to their agents at another simply to secure a wider market for their goods. The shipper's margin of profit is included in the consignment invoice price, and where the shipper is guaranteed his transportation and

other costs, as here, he is secured not only against an out of pocket loss but his profit is preserved as well. It is obvious, we believe, that the Pennsylvania court's reason for holding the clause void is entirely unsound.

It is to be noted here in passing that the Pennsylvania courts refuse to sustain any limitation of the carrier's common law liability as to damages. The difference between the rule obtaining in the Pennsylvania courts and that obtaining in this court, as stated in *Hart* v. *Pennsylvania* (*supra*), was pointed out in *Grogan* v. *Adams Express Co.* (114 Pa. St. 523, 529). The difference was also noted in *Macfarlane* v. *Adams Express Co.*, 137 Fed. Rep. 982, where the Court, although sitting in Pennsylvania, refused to follow the rule obtaining in the Supreme Court of that State, as announced in, among others noted, the *Ruppel* case (*supra*).

The State Court of Appeals in New York has not squarely decided the question, but, as pointed out in *The Merauke* (*supra*) and by the District Court (R. p. 183), there is a distinct intimation, if nothing more, in *Kilthau* v. *International Mer. Marine Co.* (245 N. Y. 361, 366), that, if the effect of a clause is to "provide a new measure of damages of which either party may claim the benefit" and not "a valuation clause solely to limit liability", it is valid and enforceable. Respondent contended below that this view was abandoned in the case of *Straus* v. *Canadian Pac. Ry. Co.* (254 N. Y. 407). We submit, however, that there is nothing in the decision in that case that necessarily alters the court's view expressed in the *Kilthau* case. The *Straus* case, moreover, was ignored below by the Circuit Court of Appeals as expressing any view different from or inconsistent with that expressed in the *Kilthau* case, the court re-affirming its intimation as expressed in *The Merauke* (*supra*), as coinciding with that expressed in the *Kilthau* case, that where the agreement was to accept the invoice cost of the damaged goods as the measure of value at destination it was

one that may be of advantage to either party, and a salutary provision.

In the courts below and before the Commissioner, as we have pointed out and considered above, respondent's attack upon the clause was that it is a provision limiting the carrier's liability and invalid because there was no proof that the shipper was offered an alternative freight rate (R. pp. 189-190). In its brief in this Court in opposition to the petition for certiorari, however, respondent raised new points of attack. We consider them briefly.

It is said that the benefit to the shipper provided by the clause is "purely speculative". That claim is clearly unsound. As appears more fully in our next point, the protection that the clause affords to the shipper against the possibility of an out of pocket loss, a protection that the common law did not provide, attached and was present from the time the contract was entered into. That benefit is no more speculative than is the protective benefit afforded by a contract of guaranty or of indemnity or of insurance against loss. True enough, the ultimate financial value or advantage of the protection is uncertain, but that fact does not deprive the agreement of the reality of its benefit as protection, and the benefit attaches and is present from the inception of the contract.

It is further said that, under the provision of the clause, "if the market has fallen 50% the carrier will be liable for half the invoice value even if one unit (of the shipment) has sustained a trifling damage". This argument begs the question. It involves the assumption, contrary to the plain implications of the parties' agreement, that the supposed *injury* to but *one parcel* of the shipment affects injuriously but that *one parcel* and *not* the *shipment as a whole* and that it is, therefore, "trifling." This, of course, is not permissible. The shipper does not recover half the invoice price because the market has fallen 50% and the actual damage to one unit of the shipment is small. He recovers because he has been injured through the carrier's negligence and his damage is measured and

adjusted on the agreed basis of the invoice value of the entire shipment. Whether such damage is substantial or "trifling", then, cannot be determined until the application of the agreed yardstick; that is, until it is determined to what extent the arrived value of the shipment as a whole, has fallen below its invoice value plus necessary expenses.

Nor is the clause objectionable because the damage is adjusted on the basis of the entire invoice value rather than on the basis of the invoice value of the damaged unit when a single unit only is lost or damaged. The unit lost or damaged may be of small value in and of itself, but its damage or destruction may seriously injure or destroy the unity of the shipment or the unit value of the shipment and so materially affect, the use by the shipper, or the selling price, of the undamaged parcels. We may take, for example, a shipment of structural iron or of building stone or of books or of furniture or in fact any shipment in which the units may bear some relation to each other, or which the shipper may intend to use as a whole for some particular purpose or to supply a particular need. While the value of one unit of the shipment in and of itself may be small, yet its loss or damage would or might seriously affect the usable or sale value of the remaining undamaged units. In such cases, to measure the shipper's loss by the invoice value of the damaged piece or parcel alone would obviously not compensate the shipper for the loss sustained. On the other hand, to measure his loss by the difference between the invoice value of the entire shipment and the value of the shipment in its damaged condition, the measure provided by the agreement, would more nearly approximate full compensation to the shipper for the loss sustained. Certainly the carrier has no cause to complain if, under its agreement, it must because of its negligence pay an amount greater than it would have to pay under the common law. And still less cause of complaint has the shipper, if by virtue of such agreement he recovers more than the common law would give him.

Indeed, the point of this criticism of the clause overlooks the accepted basis for interference by the Court with freedom of contract in carrier cases, viz., to preserve and maintain the motive of the carrier to exercise care and diligence in the performance of its duties. *Railroad* v. *Lockwood* (17 Wall. 357, 377-378). The carrier in providing in the contract of carriage a measure of damages for his negligence greater than that imposed by the law obviously strengthens rather than impairs its motive to exercise care.

Finally, it is argued by respondent that the ultimate financial benefit or detriment that under this clause may result to shipper or carrier by reason of fluctuating market values is a "gambling element". If by this argument an inference is intended that the clause is objectionable as a gambling or wagering transaction, not only is the contention raised for the first time in this Court but also it is clearly untenable.

That this clause incorporated in a common and well recognized form of affreightment contract does not convert it into a wagering contract would seem too obvious for argument. The clause as pointed out in *The Oneida* (*supra*) was designed to provide for carrier and shipper mutual protection against abnormal fluctuations in market values occurring during the performance of the affreightment contract. It simply provides a formula for the adjustment of losses based on known contingencies and known values; certainly, in the light of experience, a rational provision, and one that provides both parties with a fixed basis upon and by which further protective action may be governed.

It is true, respondent made some attempt to state the agreement in wager terms. The attempt so to state it, however, discloses the absence of the essential elements of a wager contract. The contract shows on its face that neither party had thought or intent to enter into a wager. Their dominant interest was in the affreightment of the goods; all other interests were merely incidental to that

interest. In *Carlill* v. *The Carbolic Smoke Ball Company* (1892), 2 Q. B. 484, 490-491; appeal dismissed (1893) 1 Q. B. 256, the Court in defining a gambling or wagering contract said:

> "A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in the contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties."

Obviously no true description of the agreement in the case at bar, however liberally phrased, could bring it within the definition of a wager contract. If all other necessary elements of such a contract were present, it is clear that the real interest of the parties to the affreightment contract was its performance and reached far beyond the advantage that might result to one or the other from the chance condition of the market in the event of the goods' being delivered in a damaged condition.

Nor is a contract necessarily objectionable because an advantage or disadvantage under its terms results to one or the other of the parties on the happening of a purely fortuitous circumstance. Professor Williston in his work on contracts (Vol. 3, Section 1665), in defining "when an aleatory promise involves gambling", says:

> "A contract will not be open to objection because an advantage or disadvantage by the terms of the promise accrues to one of the parties on the happening of a purely fortuitous circumstance, provided that fortuitous circumstance adds to or depreciates the value of the consideration given the promisor; while if the fortuitous circumstance bears no relation to the value of the consideration the transaction will be a wager."

As we have pointed out above, the benefit or consideration to the shipper under the clause here is protection against the possibility of an out of pocket loss; the fortuitous condition of market values is simply a circumstance that measures the ultimate value of the protection given the shipper after that protection has been received and enjoyed. The more the market at point of destination advances by the time the goods arrive, the less valuable it proves the shipper's bill of lading protection to have been; the lower the market declines by that same time, the greater is seen to have been the good afforded by that consideration.

It seems clear, therefore, that respondent's new reasons, advanced here for the first time in the course of this litigation, for holding clause "Eleventh" of the affreightment contract invalid or unenforceable, are sustainable on neither precedent nor principle.

POINT II.

The holding of the Circuit Court of Appeals that the clause exempts the carrier from liability for losses due to its negligence and is contrary to public policy is based on faulty premises, is contrary to the principle upon which contractual modification of a carrier's common law responsibility has been regularly sustained, and is not supported by precedent.

Since it is apparent from its opinion that the Circuit Court of Appeals did not accept respondent's contention, or place its decision on the ground, that the clause is invalid because of the absence of proof as to a proffered choice of freight rates, and since the opinion definitely negatives that as the ground for its determination, it is appropriate here to consider the reason advanced by that court for reversing the decision of the District Court and

the sufficiency of that reason as a basis for the determination that the clause is unreasonable, contrary to public policy and void. The reason for so holding with the accompanying supporting illustration is set forth in the opinion of the Circuit Court of Appeals as follows (R. p. 196):

> "The clause under consideration does not substitute invoice value for market value of the goods lost or injured by the carrier's negligence. It provides that claims 'shall be adjusted on the basis of the invoice value of the entire shipment.' This means, as the appellee contends and the district court held, that the invoice value of the entire shipment, not the invoice value of the lost or damaged goods, is to constitute the basis for computing whether damages have been sustained by the shipper. Thus, if there were a short delivery of 50 cases out of a shipment of 100 cases, but the market value at port of destination of the goods delivered was equal to the invoice value of the 100 cases, plus freight, the carrier would pay nothing for its negligent loss of half the shipment; and a similar result would obtain if half the cases were damaged but the market value of all the goods, damaged and undamaged, was greater than their invoice value plus freight. Indeed, in the case at bar, although a substantial part of the cherries were lost or damaged by the carrier's negligence, it escaped liability because the arrived market value of the cherries in each shipment exceeded the invoice value of the entire shipment plus prepaid freight."

We believe that it is a fair criticism of the Court's exposition of the clause, as set forth above, to point out that it envisions only a one-sided view of the picture that the clause presents, and an altogether too imperfect one to judge of its merits or reasonableness. A more perfect view and a truer reflection of its accomplishments, to adopt a method of exposition somewhat similar to that used by the Court of Appeals, may be set down as follows:

> Thus, if there were a *short delivery,* whether of 1 or 50 cases out of a shipment of 100 cases, and the

> market price at port of destination of the goods delivered was less than the invoice price plus expenses incurred by shipper, the latter is guaranteed a recovery, irrespective of market price or the number of cases lost, of the total invoice value of the shipment plus all expenses incurred; and, in the event that the market price, by reason of fluctuating or unsteady condition, is materially lower than the invoice value, the carrier must pay proportionately greater damages for its negligent loss than that for which it would be liable under the common law measure. And a similar result would obtain irrespective of whether 1 or 50 of the cases were *damaged* and whether the market price of all the goods damaged and undamaged was less than the invoice value; the shipper is guaranteed irrespective of market price or number of cases *damaged* the total invoice value of the shipment plus expenses, and, as in the case of *loss*, if the market price is materially lower than invoice value, the carrier must pay proportionately greater damages for its negligence than those for which it would be liable under the common law.

In other words, under this clause, the carrier guarantees the shipper against an out of pocket loss irrespective of market conditions at destination, and, by reason of such guarantee, it may result that the carrier must pay greater damages for its negligence than those for which it would be liable under the common law measure.

The fault, we submit, in the court's reasoning, by which it arrived at the conclusion that the clause exempts the carrier from liability for its negligence, lies in the false assumption that the standard by which to measure loss and damage is the common law measure, whereas, (under the standard agreed upon), damage is to be measured by the invoice value of the entire shipment plus expenses. The court conceded that the arrived market value of the cherries "exceeded the invoice value of the entire shipment plus prepaid freight". That being true, the shipper obviously has suffered no damage *under the*

agreed standard for measuring it. And, since we are here considering negligence in terms of loss or damage resulting therefrom, inasmuch as the shipper suffers no loss under the clause, necessarily the clause provides no exemption from damages or negligence for the carrier.

A conclusion that a clause is invalid and against public policy, as exempting the carrier from its negligence, may not be arrived at by a showing that under it the carrier escapes liability as measured by the common law. If that were true the agreed value or limitation clauses would in many cases be invalid. The rule is, however, that, notwithstanding the agreed value or limitation is purely arbitrary and grossly disproportionate to actual value or to value as measured by the common law, it will not be held invalid for that reason, (*Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278). The test as to validity is, as we believe we have demonstrated above, as follows: Is the clause reasonable under the circumstances? Does it provide the shipper with some compensating right, or is it for the sole benefit of the carrier? As was said in *Union Pac. R. Co.* v. *Burke*, 255 U. S. 317, 323, (much relied upon and quoted by respondent in the lower court), where this court held a limitation clause invalid on its appearing that the shipper was given neither alternative rates nor other compensating privilege:

> "To allow the contention of the petitioner, would permit carriers to contract for a partial exemption from the results of their own negligence without giving the shippers any *compensating privilege.* Obviously such agreements could be made only with the ignorant, the unwary or with persons deliberately deceived." (Italics supplied).

It is of interest to note that the bill of lading in the above case also contained a clause similar to the one under consideration in the *Gulf, Colorado* case (see p. 320). And although this Court, as had the New York Court of Appeals, rejected the limitation clause also contained in

the bill, it gave full effect to the clause substituting invoice value for market value at destination.

What outlawed the clause below in the eyes of the Circuit Court of Appeals was the provision therein that the unit, on the invoice value of which the loss and damage was to be computed, was "the entire shipment", instead of that part of the shipment which was lost and damaged. As will be observed from the opinion of the District Court, however, that court arrived at its determination that the invoice value of the "whole shipment" was the value upon which to compute damage, independent of and without any reference whatever to the words "entire shipment" as used in the clause (R. p. 184). The holding of that court, viz., that "the effect given similar clauses in the past has been that the damages are the difference between the invoice value of the entire shipment and the market value at time and place of destination of the goods in their actual condition" (R. p. 184), is certainly supported by the language used in the cases to which the court referred, viz.: *Gulf Colorado Ry.* v. *Texas Packing Co.* (*supra*); *The Oneida* (*supra*) at pages 692-693; *Duplan Silk Co.* v. *Lehigh Valley R. Co.* (*supra*).

There is nothing inherently objectionable or unjust in providing that loss and damage be adjusted on the basis of the invoice value of the entire shipment. Such an adjustment may operate to the advantage of the shipper quite as often as to that of the carrier. Indeed in some cases it is much more equitable, as in all it is certainly more convenient, to the shipper, to use the entire shipment as the basis. Consider, for an example, bulk shipments, such as grain. While the cargo may have been exposed to some damaging agent such, for instance, as wetting or heating, a substantial portion of it may, if it is carefully separated, be found to have suffered no actual or perceptible damage. Still, doubtless, the fact that this undamaged portion is a part of a shipment that has been damaged might affect the price for which the shipper

could sell any portion of it. And, certainly, the inconvenience to the shipper in making the separation would constitute no small hardship. It would seem obvious, in such cases, that it would be far more just to the shipper to measure the damages on the basis of the invoice value of the entire shipment.

The same result might as well ofttimes be true as to shipments in bags, cases or crates. The entire shipment may have been exposed to the damaging agent, yet in different or varying degrees, so that on complete separation a substantial part thereof would be found entirely undamaged. Here also, and for the same reasons as those pointed out above, ultimately it would probably prove more just to the shipper to use the invoice value of the entire shipment as the basis of adjustment.

Consider again a case where the shipment consists of meats or dressed fowl in iced or refrigerated cars. Because of defective refrigeration or the failure properly to ice or re-ice during transit the shipment as a whole may arrive at destination in a tainted condition. A thorough and careful inspection and separation may nevertheless disclose much of the shipment to have suffered no damage. It would only be natural under the circumstances, however, that the price that would be offered or that could be obtained for this undamaged portion would be materially affected and influenced by the tainted condition of the shipment as a whole. A measure of damage in such a case, therefore, that was based on the invoice value of the damaged goods only might very likely fall far short of making the shipper whole; a contingency that would be avoided were the damage measured by the difference between the invoice value of the entire shipment and its value at destination.

Examples might be multiplied illustrating the advantage to the shipper of a measure of damages based on the invoice value of the entire shipment rather than on only the damaged portion thereof. Such we believe unnecessary. It is enough, it would seem, that it appears that

such a measure cannot be said to be inherently objectionable, unreasonable or unjust.

Moreover, the result visualized by the Circuit Court of Appeals, as the effect of adjustment based on the invoice value of the entire shipment and condemning such adjustment for that reason, might as well occur when adjustment is based on the invoice value of merely the damaged part of the goods alone, which it in substance approved. Take, for example, the shipment here involved, viz., barrels of cherries in brine. The Commissioner found that the contents of approximately 1051 barrels (the figure including a few short delivered) were damaged in varying percentages (R. pp. 173-174, 175, 176, 178). The percentage of damage suffered was not actual but an estimate (R. pp. 104, 115) and was a damage in value, the barrels containing both sound, shrivelled and broken cherries, all of which were used, but for different purposes (R. p. 155). The Commissioner, however, for the purposes of convenience in figuring loss, converted these various estimated damage percentages into barrels of destroyed cherries, which he computed as approximately 574 barrels (R. pp. 173-176). Now, if we should assume that the arrived value of the 1051 damaged barrels was equal to their invoice value plus freight (and there is no clear proof that it was not), and further assume that the bill of lading clause in question had made the invoice value of the *damaged barrels* of cherries the basis for computing damages, the Circuit Court of Appeals would then have approved of precisely the same result as that which it has set forth as a reason for declaring the clause "unreasonable", "contrary to public policy and void", viz., that "although a substantial part (1051 barrels) of the cherries were lost or damaged by the carrier's negligence it escaped liability because the arrived value of the (1051 barrels of) cherries * * * exceeded the invoice value of the entire (1051 barrels of the) shipment plus prepaid freight" (Parenthetical expressions supplied).

There is, of course, no doubt that the true construction and application of a clause substituting *generally* invoice

value for market value requires that in "arriving at the amount of damages" the commissioner "take the difference between this invoice price and the value" of the merchandise "at the time the same was delivered" at destination. That method was specifically in issue and specifically approved both by this Court in *Gulf Colorado Ry.* v. *Texas Packing Co.* (*supra*) at page 36; and by the Circuit Court of Appeals in *The Oneida* (*supra*) at pages 692-693.

We cannot believe that there is any moral principle or any principle of public policy involved that depends upon whether the contractual basis provided for adjustment of damages is the invoice value of the entire shipment or the invoice value of the lost and damaged portion of the shipment. Either method of adjustment may prove of advantage to the shipper and of detriment to the carrier, or *vice versa;* the difference in benefit or detriment being at most simply one of degree. And it is submitted that a question of public policy cannot arise on such a tenuous foundation.

The Circuit Court of Appeals did not cite any decision, and we believe none is to be found, that holds this clause invalid or against public policy. Some reliance, however, was placed on a *dictum* in *Pearse* v. *Quebec Steamship Co.* (24 Fed. Rep. 285, 288). The clause under consideration in that case provided that the ship owner "will not be liable for *more* than the invoice value of the goods". Under this clause (later definitely construed as a true limitation of liability clause and not one fixing an impartial measure of damages, *The Styria,* 101 Fed. 728, 734), the District Court held that the goods referred to were plainly the damaged goods and that damages were to be ascertained by taking the difference between the invoice value of those goods and the value that was realized for them on sale. By way of *dictum* the court said that if the clause was to be construed as referring to both damaged and undamaged goods,

> "it would be void upon grounds of public policy, as unreasonable and as affording a direct encouragement

> to theft or non-delivery of the shipper's goods; for on every shipment, whether there was loss or not, the carrier might, without accountability, appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole, a result destructive of all commerce because enabling the carrier to appropriate all its profits."

This *dictum* shows on its face, it would seem, its own unsoundness. For, if the carrier steals or retains a part of the shipper's goods for its own benefit, it commits a larcenous act for which a criminal prosecution will lie. And clearly, in civil actions likewise the carrier can not "*without accountability* appropriate to his own use" any part of the "*owner's goods*". Any such act would obviously constitute conversion and deviation by the carrier, which would, despite such clause, not only make the carrier liable for the goods thus appropriated but also deprive him of any and all contractual benefits provided in the contract of carriage and render him an insurer without limit. (See *D'Utassy* v. *Barrett,* 219 N. Y. 420, 421; *Moore* v. *Duncan,* 237 Fed. Rep. 780, 782; *The Sarnia,* 278 Fed. Rep. 459, 466). It would seem obvious, therefore, that the *dictum* of the district judge in the above case offers no reasonable ground for declaring the clause here involved unreasonable and against public policy.

Respondent cited below, and also in this Court, in opposition to certiorari, the case of *Morrison* v. *I. & V. Florio S. S. Co.,* 36 Fed. 569, as bearing on the question. The Circuit Court of Appeals made no reference to the case, it is clearly without application on the facts and it adds nothing for consideration here. The contract of carriage in that case did not substitute for the common law standard of value a fair conventional standard, and the court necessarily measured the loss by the former standard.

Nor can it justly or logically be said that because value under the common law standard chances to be higher than value under the agreed standard on delivery of the goods,

that to measure loss by the agreed standard allows the carrier to profit by his own wrong. The carrier no more "profits" from his wrong in such case than the shipper "*profits*" from the carrier's wrong where value under the common law standard chances to be less than value under the agreed standard. There is no principle that a shipper is to be rewarded or profit because the carrier is negligent. On principle he is entitled only to compensation for his loss from such cause; and the standard to measure his loss and the carrier's liability, where the latter is negligent, is the same whether the common law standard of market value is higher or lower than the agreed standard.

While the Circuit Court of Appeals has held that here the "contract exempts a carrier from liability for losses resulting from its negligence", it appears clear that when the contract was entered into it did not provide for exemption from any real loss sustained by the shipper. No other value to the shipper than invoice value could have been in the contemplation of both contracting parties, nor any other loss than such as would result from a failure to obtain that value. At most, however, the only exemption the contract could be said to provide for was an exemption from payment of *fortuitous profits* that might result from market fluctuation during transit, and for that exemption it gave the shipper compensating protection against *fortuitous losses* resulting from the same cause. Why should not carrier and shipper be free to enter into such a contract? What interest of the public is served in refusal to enforce it? This is not a case where any unfair advantage has been taken of the shipper. It knew the terms of the contract of carriage, assented to them and signed the contract. It made no protest against its terms at the time of shipment or subsequently prior to delivery of the goods. It not only did not protest the terms of shipment, but also presumably was satisfied with, and glad to avail itself of, the protection afforded it thereby.

As a matter of fact the shipper was not, under the terms of the clause here involved, necessarily deprived of recov-

ing even the fortuitous gain resulting from fluctuation in price between date of shipment and arrival at destination. As will be observed this clause is not limited simply to the addition to invoice value of freight paid or incurred, but provides instead for "adding expenses necessarily incurred" (R. p. 194). Since it is the invariable practice for the shipper to procure insurance on the goods shipped, as was done here (O. R., pp. 125, 154-155; R. pp. 101, 127), it is reasonable to assume that the cost of procuring insurance was one of the necessary expenses guaranteed by the carrier. Thus the shipper was under this clause not only assured against any out of pocket loss by reason of fluctuating prices, but also of the expense of procuring insurance that would insure the recovery of any gain that otherwise would have resulted from like causes.

Public policy far from interdicting the enforcement of the clause requires its enforcement. "The authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society" (*Hartford Ins. Co.* v. *Chicago, etc., Railway,* 175 U. S. 91, 106). On the other hand the well settled policy of freedom of private contract, the common policy of English speaking peoples requires that unless it clearly appear that they contravene public right or the public welfare contracts must be enforced. As was said by Sir George Jessel in *Printing etc. Co.* v. *Sampson,* L. R. 19 Eq. 462, 465 (quoted by this Court in *Hartford Ins. Co.* v. *Chicago, etc. Railway, supra*):

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and

> shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

We submit that this clause clearly does not contravene public right or the public welfare. The shipper here has enjoyed the protection offered by the clause during the period of transportation, a protection that the common law did not provide for him. Having enjoyed the benefit and protection offered by the clause during transportation, no sound principles either of justice or of public policy, it would seem, can justify the shipper's repudiation of his agreement under the clause after the event shows it to have been to his interest to do so. To allow him to avoid the contract when the event of shipment shows it to have been to his advantage to do so, a contract entered into without protest of any kind by him at the time of, or subsequent to, shipment, is, it would seem, to reward him for a form of duplicity or deceit, and the only interest served that of his cupidity.

In *Hart* v. *Pennsylvania*, 112 U. S. 331, the bill of lading contained an agreed value or limitation clause and the shipper under it had enjoyed the benefit of a reduced freight rate in the shipment of his livestock. After transportation had been finished the interest of the shipper lay in, and he attempted a repudiation of, the limitation provision. In enforcing it, this Court said in part at page 341:

> "It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

We submit that there is no difference in principle between the *Hart* case and the one at bar. In the *Hart* case the shipper had under the clause enjoyed a reduced freight rate in transportation. Here the shipper under the clause had enjoyed protection against the possibility of an out of pocket loss resulting from a falling market. After the event of transportation in the *Hart* case it was to the shipper's interest to repudiate his agreement, just as here it was to the interest of the shipper after the event of transportation to repudiate its agreement. Benefit, although different in kind, was enjoyed by the shipper, in the one case as well as in the other, and repudiation, we submit, is no more permissible here than it was there.

We submit in conclusion that the holding of the Circuit Court of Appeals that the clause exempts the carrier from its negligence is without justification, and that there is no other ground for holding that the clause is contrary to public policy and void.

POINT III.

The decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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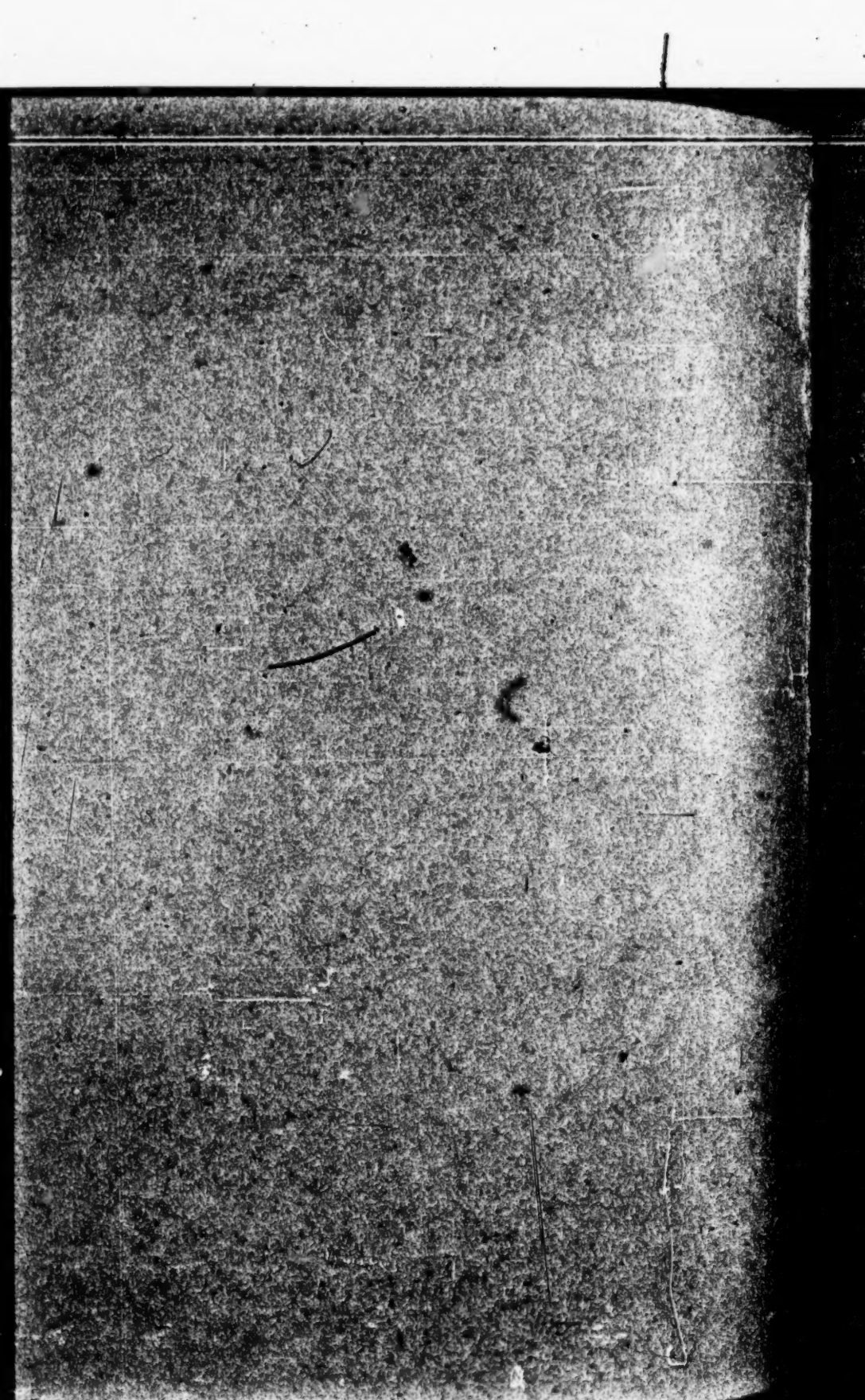

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Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 521.

STEAMSHIP "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, CLAIMANT,

Petitioner,

against

THE RHEINSTROM BROTHERS COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT.

HOMER L. LOOMIS,
Counsel for Petitioner.

HOMER L. LOOMIS,
REGINALD B. WILLIAMS,
On the Brief.

Law Print Shop Publishing Office, Inc., 154 Fulton St., New York, N. Y.

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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 521.

Steamship "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant,
Petitioner,
AGAINST
THE RHEINSTROM BROTHERS COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER.

POINT I.

Section 1 of the Harter Act is merely a declaration of the common law and adds nothing for consideration on the question of the validity of the clause.

Respondent in Point I of its brief invokes Section 1 of the Harter Act (U. S. Code, Title 46, Sec. 190) as establishing the invalidity of clause "Eleventh" of petitioner's bill of lading. This is the first suggestion in the course of the litigation that the Harter Act as such had any additional bearing on the question here presented.

The section is obviously simply declaratory of the common law. The Harter Act adds nothing to, but rather relaxes, the rigor of the rule theretofore stated by the courts relative to stipulations against negligence. Such in

substance was the conclusion stated in *Knott* v. *Botany Mills*, 179 U. S. 69, 71, 76. In that case this Court, after pointing out at page 71 the rule prevailing prior to the act, which prohibited carriers by land or sea from exempting themselves from liability for negligence, held at page 76 that, while a foreign vessel was entitled to enjoy the benefits of Section 3 of the Harter Act, no reason had been suggested why such vessel should not also be subject to the "prohibition of the *first* section *affirming* the unlawfulness of stipulations against liability for negligence" (Italics supplied).

It would seem clear, therefore, that Section 1 of the Harter Act, as simply an affirmance of the common law rule relative to stipulations against negligence, has no additional bearing and sheds no additional light on the question whether clause Eleventh of the Petitioner's bills of lading is invalid.

POINT II.

The clause is reasonable and so not contrary to public policy and does not require the proffer of an alternative freight rate to make it valid.

The argument of respondent in Points II and III, as we understand it, may be thus summarized: The clause is unreasonable and against public policy, and even if reasonable is invalid because the shipper was not proffered an alternative freight rate. Respondent's argument that the clause is unreasonable and offends against public policy is predicated primarily upon the claim that the clause exempts the carrier from its negligence. The premise, however, is entirely assumed. And with the possible exception of some half dozen state court cases cited, only two of which are quoted from, and which we shall consider later, respondent has cited no case,

either state or federal, in support of it, although it has quoted liberally from cases that we have considered in our main brief and dismissed as without bearing or as not inconsistent with the cases holding the clause valid. As we shall soon briefly point out, the great weight of authority both state and federal hold that clauses similar in character to clause Eleventh do not exempt the carrier from its negligence, but simply provide a measure of damages where loss occurs and are not unreasonable or against public policy.

It is true that this agreed measure is different from the common law measure in that it makes invoice value plus expenses instead of market value at destination, the standard for measuring loss. As said in *St. Johns N. F. Shipping Corp.* v. *Companhia Geral, etc.*, 263 U. S. 119, 125, "*Generally*, the measure of damages for loss of goods by carrier * * * is their value at destination" (Italics supplied). However, as pointed out in Hutchinson on Carriers, Vol. 3, Sec. 1360, one of the authorities cited by the court in support of this rule, such measure is "by no means an inflexible rule" (*id.* Sec. 1361). The reason for the rule was doubtless that in the "majority of cases" it measured "the extent of the loss of the shipper and of compensation for its breach, which it may be reasonably supposed *was in the contemplation of the parties at the time of making the contract*" (*id.* Sec. 1360) (Italics supplied). *A priori* if the parties have stipulated invoice value or value at point of shipment plus necessary expenses as the standard of value, that value would measure the extent of the loss and compensation for breach "which it may be reasonably supposed was in the contemplation of the parties at the time of the making of the contract." No other value to the shipper, it would seem, than invoice value could have been in contemplation of the parties to the contract, nor any other loss for breach of contract than such as would result from a failure to obtain that value.

As pointed out in our main brief, we believe that the validity of the clause as a reasonable modification of the carrier's common law responsibility was clearly established by the decisions in *Phoenix Ins. Co.* v. *Erie Transp. Co.*, 117 U. S. 312, 332; *Gulf, Colorado, &c., Ry.* v. *Texas Packing Co.*, 244 U. S. 31, 36-37, and *The Oneida*, 128 Fed. Rep. 687, 692 (certiorari denied 194 U. S. 632). However, even if it may be said that the question is an open one here, we submit that on principle and under the great weight of authority the clause may not be condemned as one exempting the carrier from liability on account of negligence.

A glance at the state court cases quoted in our main brief, pages 22-27, which give to similar clauses the construction adopted by the great majority of the state courts that have passed upon such a clause, not only negative it as one that provides "exemption from liability on account of negligence", but also hold it to be reasonable, and enforceable without the proffer of an alternative freight rate.

At page 23 of its brief respondent cites cases from four states which it is claimed hold the clause invalid "at least when no choice of rates is given". And at page 24, an excerpt from *Denver & R. G. R. Co.* v. *Peterson Grocery Co.*, 59 Colo. 125, is quoted, citing cases from the same states, including that of *Ruppel* v. *Allegheny Valley R. Co.*, 167 Pa. 166, representing the minority view that the clause is invalid where no choice of rates is given. It is to be noted in this connection that the Colorado Supreme Court refused to follow the minority view. Its conclusion as to the clause, after an extended consideration of the authorities, is summed up as quoted on page 24 of our main brief as follows,

> "as it appears to be recognized as valid in interstate shipments, and also has been held reasonable and valid when fairly and freely entered into, by a majority of the state courts which have heretofore passed

upon it in intrastate shipments, we are of the opinion that we should adopt the conclusion of the majority and hold it valid until the Supreme Court of the United States declares otherwise * * *".

The above decision was rendered at the January Term, 1915, (59 Colo. 1, 125). Thereafter in May 1917 this Court in *Gulf, Colorado &c. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 36, construed and enforced a clause similar to the one under consideration in the *Colorado* case.

In an extended note in L. R. A. (1918 B), 720, 727, cases that have had the clause under consideration are collected and reviewed. The conclusion of the commentor is: "that the great majority of the courts uphold such a stipulation as merely providing a valid standard by which valuation shall be determined" (p. 721); that "the decided weight of authority is to the effect that a provision of this character is not a limitation of the carrier's common law liability * * * and does not require a reduced freight rate or other special consideration to sustain it" (p. 723); that "in fact, the great weight of authority is to the effect that such a provision is neither unreasonable in nature, nor against public policy" (p. 724).

Probably the most penetrating consideration of the clause is found in *Shaffer Co.* v. *Chicago, etc. R. Co.* (21 I. C. C. 8, 12) cited at page 22 of our main brief. In that case it was pointed out that the contract "makes no attempt to exempt the carrier from liability for the full value of the commodity transported, nor does it in any way limit the carrier's liability to a sum less than the value of the commodity". It was further pointed out that, although the contract "admittedly changes the common law rule which makes the carrier liable for the value of the property at place of destination", "it must be remembered that although the rule works to the advantage of the carrier when the market price has advanced

subsequent to the date of shipment, it benefits the shipper in case the market price at destination should decline; and it seems fairly probable that in the long run the rule would be of advantage to the shipper as often as to the carrier".

The principal cases in the state courts relied upon by respondent are the *Ruppel* case (*supra*) and *Straus* v. *Canadian Pacific Ry. Co.* (254 N. Y. 407), which we have already dealt with in our main brief. There is in the *Straus* case, as appears from the language respondent quotes, clearly nothing necessarily at variance with the intimation expressed in the *Kilthau* v. *International Mer. Marine Co.* (245 N. Y. 361) and respondent can hardly be serious in its statement at page 27, viz., that "it is a fair assumption that the Circuit Court of Appeals for the Second Circuit would attach at least as great weight to the decision in the *Straus* case as they attached to the intimation in the *Kilthau* case". Respondent emphasized the decision of the *Straus* case before the Circuit Court of Appeals and quoted from it extensively in its brief in that court. However, as pointed out in our main brief at page 28, that court ignored the *Straus* case as expressing any view different from, or inconsistent with, that expressed in the *Kilthau* case, the Court reaffirming its intimation as expressed in *The Merauke* (31 F. (2d) 974, 975) as coinciding with that expressed in the *Kilthau* case (R. pp. 195-196).

Respondent inaccurately states at page 20 that petitioner cited the language there quoted from *Chicago, etc. R. Co.* v. *McCaull-Dinsmore Co.* "as supporting the petitioner's argument that no choice of rates need be given to support a true valuation clause". Petitioner referred to the language in that case (see p. 12 of our main brief) as negativing any possible construction of clause Eleventh as a limitation of liability clause as defined in *The Merauke*, 31 F. (2d) 974, 975. In the latter case and also in *Kilthau* v. *International Mer.*

Marine Co., 245 N. Y. 361, 366, it was strongly intimated that if the agreement was mutually binding "to accept the invoice value (of the goods) as the measure of their value at port of destination", it would be valid without an alternative freight rate. Nor are we able to follow respondent's apparent inference, that, because the record in *Chicago, etc. R. Co.* v. *McCaull-Dinsmore Co.*, *supra*, may disclose an option as to shipment, that, therefore, the Court's favorable language in reference to the convenience and reasonableness of the clause must be attributed to this option, although the Court made no reference whatever thereto. Obviously, if the clause was reasonable on its face, the existence of the option might be further evidence of its reasonableness and still constitute no *sine qua non*. The clause declared invalid in *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317, as pointed out in our main brief, page 36, was one limiting liability to an arbitrary value within the definition of a limitation of liability clause, as defined in *The Merauke* (*supra*), and was held invalid, on its appearing that the shipper had been given neither an alternative freight rate nor other "compensating privilege".

At page 22 of its brief respondent disposes of the holdings in *Phoenix Ins. Co.* v. *Erie & Western Transp. Co.* (*supra*), *Gulf, Colorado &c. Ry.* v. *Texas Packing Co.*, 244 U. S. 31, 36-37, (*supra*) and *The Oneida*, 128 Fed. Rep. 687, 689 (*supra*), with the statement that in those cases both parties were satisfied with the clause and the court did not pass on its validity. In support of this statement as to *The Oneida*, (*supra*) respondent quotes from the statement of the court at page 689, that "the commissioner commenced his computation by fixing the value of the cotton at the amount stated in the invoice" and that there was no exception "challenging its accuracy". That statement is clearly insufficient to support respondent's conclusion. It meant no more than that there was no dispute between the parties that the invoice value was the

same as "value or cost at time and place of shipment", as provided in the clause then under consideration. This fact is made abundantly clear a few lines further on, which respondent must have overlooked and in which the court said: "We start, therefore, with the assumption that the cost or value of the cotton at place of shipment *is correctly stated*" (Italics supplied). There was in that case clearly a dispute, which the court was called upon to determine, as to the amount of the shipper's damages and the carrier's liability resulting from the latter's negligence. In doing so the court upheld the clause, in the language quoted in our main brief at page 19, as one inserted in the bill of lading for the benefit of both parties and that under it the shipper's loss "was fairly measured by the difference between the cost or value of the goods at the time and place of shipment and their value in their damaged condition at place of delivery, together with expenses incurred for their transportation". If this were not sufficient to establish that the question as to the enforceability of the clause was at issue in that case we have the express statement relative thereto in the opinion of Judge Hough in *Duplan Silk Co.* v. *Lehigh Valley R. Co.*, 223 Fed. 600, 602, (who was counsel for appellant in *The Oneida,* as appears from 128 Fed. Rep. 687, 688). that "it was held to be a conventional substitution of the former value for the latter; the shippers *were estopped from using or claiming a higher value* * * *" (Italics supplied).

As to the two other cases, respondent advanced no factual basis whatever for its conclusion. And the very language of the opinions in those cases, as quoted at pages 19-21 of our main brief, negatives any reasonable basis for respondent's statement.

At page 11 of respondent's brief some attempt is made to deprecate the results of the application of the clause in a fantastically suppositious case where prices have fallen seventy-five per cent. during transit, and there

is apparent damage, resulting from negligent delivery by the carrier, as to only a small part of the commodity carried. Such a fortuitous situation would probably not happen once in a generation, and, if it did, it is difficult to see how it would prove anything of value. For the very same case thus imagined by the respondent would, with the premises changed only slightly, produce equally surprising results under the common law measure of damages, for the sanctity of which the respondent here argues.

Thus, let us suppose that, because of the negligence of the carrier in delivering the sugar at New York, the boat overturned and all of the bags, save one, were lost. The shipper under the common law rule of damages, which would measure his recovery by market value at destination, would recover but one-quarter of what he had actually paid for his sugar and would have suffered an actual loss of $1,500,000.

Or, again, let us suppose, that the market advances from 5 cents to 20 cents per pound during the course of the voyage and the bill of lading provides that, in case of loss or damage, the same shall be computed according to the common law or market value measure of damages with the entire shipment, instead of the individual bags, to be deemed the damaged unit and damages computed accordingly. Let us further suppose, as suggested by respondent, that by reason of negligence in the carrier's delivery of the sugar at New York one bag is dropped overboard and the rest delivered in perfect condition. In such event precisely the same result would follow as that envisaged by the respondent. Under the common law rule of damages, with the entire shipment treated as the unit rather than the individual bags, the shipper would be entitled to collect from the carrier as his damage the sum of $1,500,000 for an apparent loss of only one bag.

Thus, it is plain to see, that in unusual cases of the type supposed by the respondent, there may easily be a non-

compensable loss of $1,500,000 to the carrier or to the shipper, even in respect to the same shipment, whether the measure of damages applied be the common law or market value measure or whether the measure be that of invoice value; and this, too, whether the damaged unit be considered the shipment as a whole or the individual bags in the shipment.

It is obvious that where the equation used for resolving damage to dollars and cents involves one or more variables, the monetary result must vary with each individual case dependent upon the uncertain and unpredictable movement of the variables. The virtue of the damage formula that substitutes value at port of shipment for value on arrival at destination is, that it not only substitutes a known and constant factor for one of these unpredictable variables but also provides a measure of damages that can never produce an actual out of pocket loss to the shipper. Thus, it is to be noted, in all of the unusual types of cases above discussed, it is always the carrier that loses the one and a half million dollars when the invoice value is made the measure of the damages; never the shipper. It is only where the market value at destination serves as the damage basis, that the shipper may suffer such an actual out of pocket loss.

The point of respondent's criticism, thus, as pointed out at page 31 of our main brief, overlooks the ground upon which courts have justified their interference with freedom of contract in carrier cases, viz., to preserve and maintain the motive of the carrier to exercise care and diligence in the performance of its public duties (*Railroad* v. *Lockwood*, 17 Wall, 357, 377-378; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 440). We can conceive of no stronger incentive to the carrier for the faithful exercise of care and diligence in the performance of its duties than the fateful possibility suggested by respondent as a result of failure to do so. There has never been a hint in the books (and the usual statement is to the contrary) that a carrier may not by special stipulation under-

take a more stringent obligation than that which the law casts upon him. This is an age of keen competition in ocean carriage. The protection offered by clause Eleventh may have been the inducement, or one of the inducements, for the shipper's selecting petitioner as the carrier of the goods. Presumably in consonance with good accounting procedure, if it is its own insurer, the carrier has set up a proper reserve on its books to meet its contingent losses and this with or without the clause in question. And, whether it is its own insurer or secures its protection from others, clause Eleventh gives a measure of damages that at least provides the carrier in advance of shipment, with the elements whereby to forecast the worst that may befall him; just as it enables the shipper at the same time to assure himself that he shall in no event suffer a net loss on his venture, leaving as the sole element of uncertainty for him the precise extent of his possible profits.

The suggestion that the carrier might not be sufficiently solvent to meet the possible obligations that might be incurred under the clause, as also the other question as to the corporate powers of the carrier to undertake it, is too far-fetched for serious consideration. Presumably shippers investigate the financial solvency of a carrier to whom they entrust their goods. And even those few jurisdictions which have held similar clauses invalid have not even suggested lack of corporate power as a factor in their decision. The same fateful possibilities as to the carrier's liability exists under a clause that makes the value of the damaged goods the basis of adjustment as under a clause that makes the value of the entire shipment the basis. As pointed out in our main brief, at page 40, either method of adjustment may prove of advantage to the shipper and of detriment to the carrier, or *vice versa,* the difference in benefit or detriment between the methods being at most simply one of degree. The further intimation of respondent at page

10 that the form of bill here used was used by the carrier for the first time, presumably for this particular shipment, and may never be used again, would seem to merit no serious consideration.

POINT III.

The clause is a reasonable modification of the carrier's common law responsibility and the shipper having assented to it and enjoyed its protective benefits during transit may not repudiate it after the event of shipment shows it to have been to his advantage to do so.

In its Point IV respondent attempts to invoke the rule in *Railroad* v. *Lockwood* (*supra*). If the provision here involved were like the one in that case (an express provision stipulating against any liability for negligence) the petitioner would not be in this Court. Such a provision is unreasonable and in view of the public nature of the duties undertaken by the carrier the Court will assume that an assent to it was not freely given.

That the Court does not take this view, however, where the provision involved is simply a modification of the common law responsibility that would otherwise prevail, we pointed out in our main brief at pages 13-14. The same contention in substance as that which is here made was contended for in *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 430-431, viz., that a reduced rate or other consideration was a condition for any modification of common law liability, and that "both rates must be offered shipper and be reasonable, and the shipper be given a genuine freedom of choice in making a selection".

With such contention this Court expressly refused to agree, stating the sound rule and, as we believe, the rule to be applied here, as follows:

> "There can be no limitation of liability without the assent of the shipper, *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 6 How. 344, and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. *Railroad* v. *Lockwood*, 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174. Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed".

The test as to validity here stated, it seems clear, is assent of the shipper expressed in the acceptance of the bill of lading and the reasonableness of the limitation provision. In consonance with such rule a provision in a bill, limiting the shipper's recovery in case of loss to a limited or agreed value, although arbitrary in amount, where the shipper had the option of shipping without such limitation at a higher rate, is upheld because it is "reasonable" that the charge for carriage should bear some relation to the responsibility undertaken. (*Adams Express Co.* v. *Croninger*, 226 U. S. 491, 510). To say, however, that, because in this and like cases the limitation has been sustained, alternative rates are therefore a condition for sustaining limitations of common law liability is, it seems to us, to forsake the substance of the rule and follow its shadow.

We have already considered the reasonableness of the provision here involved.

To say that a mutually binding stipulation, that losses shall be adjusted on the basis of the invoice value of the goods plus expenses, is a stipulation against negligence, because, while that is the only value the goods had at the time of the agreement, it may chance that on delivery

they may have a higher value, is we submit a strained and unreasonable construction. The effect of the clause is no different in principle, it would seem, from one that values the subject matter of a contract or one that liquidates in advance the damages in case of breach of contract. And, as was pointed out by this Court in *Hart* v. *Pennsylvania Railroad Co.,* 112 U. S. 331, 341,

> "The subject matter of a contract may be valued, or damages in case of breach may be liquidated in advance."

The only judicial support for the contention, that the clause exempts the carrier from the consequences of its negligence, is the *Ruppel* case (*supra*) and the conclusion in that case, as we have pointed out in our main brief, at page 27, was predicated on assumptions that have no basis in fact. The reason for refusal to enforce the clause in other states following the minority view is perhaps typified by that of the Arkansas courts, which refuse to enforce any provision modifying the carrier's common law liability in the absence of a reduced rate and so hold invalid the common bill of lading exception against "breakage or leakage" where no reduction is given (*St. Louis, I. M. & S. Ry. Co.* v. *Caldwell,* 89 Ark. 218; 116 S. W. 210, 211).

That the shipper assented to the provision is clear. It not only accepted the bill but signed the contract (O. R. p. 139). Respondent suggests that because the bill of lading was in English and issued at an Italian port the shipper probably could not read it. It is a far-fetched possibility that a shipper engaged in the importing and exporting business (R. p. 149) could not read, and would sign any contract put before him. Furthermore, such possibility is negatived not only by the fact that the signer of the bill designated himself "The Shipper" in good English script, but also by the circumstance that there has never been a suggestion heretofore in the course of this litigation that the shipper was not entirely familiar with the provisions of the bill. And the cause of action here is based on contract, as evidenced by the bills of lading, which respond-

ent introduced in evidence as its own exhibits (O. R. ff. 4, 9-10; O. R. 139, Lib's. Exs. 1-3). The suggestion of ignorance obviously comes too late. As was pointed out in *Hart* v. *Pennsylvania R. R. Co.*, (*supra*),

> "The plaintiff did not in the course of trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued."

We submit in conclusion that there is no sound basis for refusal to enforce the clause here involved. Even if it may be upheld only in terms or on the basis of estoppel, estoppel is here. As was pointed out by Judge Hough in *Duplan Silk Co.* v. *Lehigh Valley R. Co.* 223 Fed. Rep. 600, 602, referring to a similar clause before the Court of Appeals in *The Oneida* (128 Fed. Rep. 128; certiorari denied 194 U. S. 632), the invoice value was but "a conventional substitution", for the market value at destination, as a proper measure of damages, and the shipper was "estopped from using or claiming" a measure other than that upon which he had thus agreed and by which he had thus been protected during the course of the transportation.

POINT IV.

The decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 521.

S. S. "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant,
Petitioner,

—against—

THE RHEINSTROM BROTHERS COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

D. ROGER ENGLAR,
Counsel for Respondent.

HENRY N. LONGLEY,
F. HERBERT PREM,
Of Counsel.

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—against—

THE RHEINSTROM BROTHERS COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

This is the petitioner's second application for a writ of certiorari in this case. The previous application for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit on the question of liability was denied by this Court in 1928, 278 U. S. 633, 49 S. Ct. 31. Thereafter, the damages were fixed by a commissioner who found that the respondent's merchandise, consisting of 4266 barrels of cherries in brine, had sustained extensive damage, whereby many barrels became worthless and others lost a considerable part of their contents. The evidence was that about one-quarter of the barrels were damaged, and

> "that the brine had leaked out of the barrels and the fruit rotted; and that a large quantity

> of cherries, and broken and crushed barrel staves were found lying on the floor of the compartment" (Report of Commissioner, R., pp. 236-7).

A considerable number of barrels were wholly missing (R., p. 244, fol. 732).

Both the District Court and the Circuit Court of Appeals supported all the findings of the commissioner as to the extent of the damage.

It appeared, however, that owing to favorable market conditions prevailing at destination, the total market value of the merchandise which remained in specie, taking the sound and damaged together, exceeded the values stated in the invoices under which the goods were shipped. Under these circumstances the District Court held that the respondent was barred from any recovery under the following clause in the bill of lading:

> "11. In the event of claims for loss, damage or short delivery, the same shall be adjusted on the basis of the invoice value of the entire shipment, adding expenses necessarily incurred" (Opinion of District Court, R., p. 252).

The shipper was given no choice of rates, and did not have an opportunity to ship at a higher freight rate under which the carrier's liability would be unlimited.

The Circuit Court of Appeals reversed the decree of the District Court, and directed that the respondent recover in accordance with the commissioner's report. It is this decision which this Court is asked to review in the present proceeding.

POINT I.

The clause is void as unreasonable.

The results of the bill of lading clause above quoted are readily apparent. If one hundred units of merchandise are shipped and only fifty are delivered, the carrier is under no liability whatever if the merchandise happens to be worth twice as much at destination as at the port of shipment. On the other hand, if the market value has fallen 50%, the carrier will be liable for half the invoice value of the entire shipment if even one unit has sustained a trifling damage.

The petitioner argues that this gambling element renders the clause reasonable; that the cargo-owner should be willing to stake his actual damages, in one class of cases (where the market rises), against the chance of winning, in another class (where the market falls), something to which he has no logical or moral claim. In considering the reasonableness of the clause, it will be noted at the outset that the odds are very strongly in favor of the carrier; for the movement of cargo is based on the fact that it is worth more at destination than at the port of shipment. Cases where the opposite is true, are highly exceptional. The fatal objection to the clause, however, is that, in a case like the present, it gives the carrier complete exemption from liability for the negligent destruction of property in its custody. This Court has never upheld any valuation or limitation clause under which a common carrier could wholly escape liability for the physical destruction of cargo in its custody, due to its negligence. Indeed, we have found no case in which any court has sustained such a clause; the early decisions are to the contrary, and

we think the present is the first case in which their authority has been questioned. *Pearse* v. *Quebec S. S. Co.*, 24 Fed. 285, 287-8-9 (S. D. N. Y.); *Morrison* v. *I. & V. Florio S. S. Co.*, 36 Fed. 569, 571 (D. C. N. J.). See also *Ruppel* v. *Allegheny Valley R. R. Co.*, 31 Atlantic Reporter 478, 480 (Sup. Ct., Penn.).

We, therefore, submit that the Circuit Court of Appeals correctly decided that the clause above quoted is unreasonable and void.

POINT II.

The clause is invalid because the shipper was given no choice of rates.

We submit that the clause is invalid on another ground which the Circuit Court of Appeals mentioned, but did not pass upon. The clause undertakes to fix a conventional valuation for the property shipped, without giving the shipper the alternative of holding the carrier to its common law liability in consideration of a higher freight rate. This a common carrier is not permitted to do, quite apart from the question whether the proposed valuation is reasonable.

So far from being novel or doubtful, this question was passed upon and we believe definitely settled by this Court as late as 1920, in the most specific and positive terms. *Union Pacific Railroad Company* v. *Burke*, 255 U. S. 317, 41 S. Ct. 283. In the *Burke* case the petitioner made exactly the same argument which the petitioner makes here, *i. e.*, that the shipper need not have a choice of rates provided the valuation clause be reasonable (see Petitioner's Brief,

p. 16). After explaining the theory on which valuation clauses have been sustained, this Court said:

> "The petitioner admits all this, but contends that it has never been held by this Court that such choice of rates was essential to the validity of valuation agreements, and, arguing that they should be sustained unless shown to have been fraudulently or oppressively obtained, it affirms the validity of the agreement in the Yokohama bill of lading, and cites as a decisive authority *Reid* v. *American Express Co.*, 241 U. S. 544.
>
> "With this contention we cannot agree.
>
> "This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U. S. 331, 338 and 246 U. S. 439, 444, *supra*), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given—where 'the rate was tied to the release' " (p. 321).
>
> * * * * * * * *
>
> "Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception" (pp. 322-3).

In view of this language we deem it unnecessary to indulge in an elaborate discussion of the decisions in the various State courts. There is some conflict in the State court decisions, but the law is now settled in the Federal courts that a common carrier cannot cut down his common law liability except by a con-

tract which the shipper voluntarily accepts in consideration of a reduced rate of freight. In the present case the shipper had no choice in the matter, and the only consideration which the carrier claims to have given him is a purely speculative benefit which he may or may not have desired.

CONCLUSION.

We submit that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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Counsel for Respondent.

HENRY N. LONGLEY,
F. HERBERT PREM,
Of Counsel.

New York, November 21, 1934.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 521.

Steamship "ANSALDO SAN GIORGIO I" Societa Nazionale di Navigazione, Claimant,

Petitioner,

—against—

THE RHEINSTROM BROTHERS COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

D. ROGER ENGLAR,
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HENRY N. LONGLEY,
F. HERBERT PREM,
On the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 521

Steamship "ANSALDO SAN GIORGIO I" Societa Nazionale di Navigazione, Claimant,

Petitioner,

—against—

THE RHEINSTROM BROTHERS COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

The opinion of the Circuit Court of Appeals (R., pp. 193-197) is reported in 73 F. (2d) 40. The opinion of the District Court (R., pp. 180-185) is reported in 3 F. Supp. 579.

STATEMENT

This proceeding was begun in the Southern District of New York by the filing of a libel *in rem* against the Steamship "Ansaldo San Giorgio I" for damage to three shipments consisting of 4266 barrels of cherries in brine, carried on that vessel from Italian ports to ports in the United States, consigned to this respondent. The trial in the District Court resulted in an interlocutory decree for the libellant (this respondent). That decree was based on an opinion in which it was found that the damage resulted from bad stowage (O. R., pp. 157-8; 1928 A. M. C. 109).* On appeal from this interlocutory decree the

* We shall follow the petitioner's method of using the letter (R.) to indicate references to the record in this proceeding; and the letters (O. R.) to indicate references to the record in the earlier proceeding on the merits, which record constitutes Exhibit 3 in this proceeding (R., p. 6). See footnote on page 1 of petitioner's brief.

Circuit Court of Appeals affirmed the decision of the District Court without opinion (26 Fed. (2nd) 1016). The shipowner (petitioner here) petitioned for a writ of *certiorari*, which was denied by this Court (278 U. S. 633).

The case was then referred to a commissioner to ascertain and compute the recoverable damages. After lengthy proceedings the commissioner found that the containers and the cherries in brine contained in them, were in good order and condition when delivered to the petitioner's vessel at the ports of shipment in Italy. He also found that, upon discharge of the cherries at the ports of destination, 162 barrels had become a total loss and that there was additional damage equivalent to the loss of 419 barrels, or a total loss to the libellant of 581 barrels. The evidence was that about one quarter of the barrels were damaged, and

> "that the brine had leaked out of the barrels and the fruit rotted; and that a large quantity of cherries, and broken and crushed barrel staves were found lying on the floor of the compartment" (Report of Commissioner, R., p. 170).

A considerable number of barrels were wholly missing (R., p. 176).

The commissioner determined the market value of the cherries on the date of arrival, and found that the libellant's damages, exclusive of interest, totaled the sum of $17,075.42. He also found that the libellant was entitled to interest, computed to October 17, 1932, in the sum of $8,931.57. The total damages found by the commissioner, therefore, including interest to the date of his report, was the sum of $26,006.99.

One of the grounds of defense upon which the petitioner relied in the proceedings before the commissioner, was clause 11 of the bill of lading, which reads as follows:

> "In the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred."

The commissioner held that this clause was invalid because there was no evidence that the shipper was given a choice of rates by the carrier (R., pp. 172-3).

Exceptions were filed by the claimant (petitioner here) to the commissioner's report, and were argued before Judge Patterson on January 30, 1923. He sustained the commissioner's findings of fact in all respects but found that clause 11 of the bill of lading was valid and that under that clause the libellant could recover nothing, although it was established that the libellant had sustained an actual loss of 581 barrels of cherries, having a value of $17,075.42, and that this loss resulted from the carrier's negligence in the stowage of the cargo.

The basis of this decision was that, owing to favorable market conditions prevailing at destination, the total market value of the merchandise which remained in specie, taking the sound and damaged together, exceeded the values stated in the invoices under which the goods were shipped. Under these circumstances the District Court ordered that the libel be dismissed (R. 187).

The opinion of the District Court sustaining the exceptions to the commissioner's report (R. 180-185) is reported in 3 F. Supp. 579.

This respondent (libellant) appealed to the Cir-

cuit Court of Appeals, which reversed the judgment of the District Court and ordered that a decree enter in favor of this respondent (libellant) in accordance with the commissioner's report (R. 198; 73 F. (2d) 40).

The basis of the decision of the Circuit Court of Appeals was that clause 11 was unreasonable in that it required the damages to be fixed on the basis of the "invoice value of the *entire shipment*", instead of on the invoice value of the portion that was damaged. That court found it unnecessary to decide, and did not decide, whether a clause fixing the damages on the basis of the invoice value of the goods damaged would have been valid without giving the shipper the alternative of declaring the true value and paying a higher rate of freight.

The sole issue in this Court is the validity of clause 11 of the bill of lading quoted above.

POINT I.

Clause 11 of the petitioner's bill of lading is invalid because it violates the express terms of the Harter Act.

Section 1 of the Harter Act (Act of February 13th, 1893); U. S. Code, Title 46, Sec. 190, is as follows:

> "§190. *Stipulations relieving from liability for negligence.* It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper

> loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect" (Feb. 13, 1893, c. 105, §1, 27 Stat. 445).

In the present case it is no longer disputed that respondent's property, while in the custody of the petitioner as a common carrier (O. R., pp. 2 and 7), was in part totally destroyed and in part physically damaged, whereby the respondent sustained an actual commercial loss of upwards of $17,000. It is contended that clause 11 of the bill of lading completely exonerates the petitioner from any liability whatever in respect of this loss. Under these circumstances it seems clear that the result attributed to the clause in question is expressly and specifically prohibited by the statute. The statute provides that *it shall not be lawful for the master or owner of any* vessel "to insert in any bill of lading * * * any clause * * * whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence * * * in proper * * * stowage * * * of any and all lawful merchandise or property committed to its or their charge".

The petitioner relies upon clause 11 of its bill of lading as relieving it from any liability for the loss sustained by the respondent through the negligent stowage of its property. Possibly human ingenuity could devise a form of words which would forbid such a result more clearly than the language above quoted from the Harter Act; but we doubt whether this could be accomplished without departing from the brevity which is usual and desirable in statutory enactments.

In this aspect of the case we rest our argument on the language of the statute.

POINT II.

Clause 11 of the petitioner's bill of lading is unreasonable and void as against public policy.

A common carrier cannot, by contractual provision, escape liability for damage to merchandise resulting from its negligence.

> *Railroad Co. v. Lockwood*, 17 Wall. 357, 384;
> *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 438-9;
> *Knott v. Botany Mills*, 179 U. S. 69, 71;
> *The Jason*, 225 U. S. 32, 49.

In the absence of any valid stipulation limiting its liability, a carrier's liability for loss of or damage to goods is measured by the market value of the goods at the port of destination on the date when they should have arrived.

> *St. Johns N. F. Shipping Corp. v. Companhia Geral, etc.*, 263 U. S. 119, 125;
> *New York, etc. R. Co. v. Estill*, 147 U. S. 591, 616-17;
> *The Meranke*, 31 Fed. (2d) 974, 975 (C. C. A. 2nd Cir.).

In the present case the respondent suffered an actual loss of over $17,000 computed by deducting from the sound value at destination of the damaged merchandise, the value of the merchandise in its damaged condition.

The petitioner contends that under clause 11 of the bill of lading, the carrier is relieved of all lia-

bility for this loss caused by its own negligence. A provision which can bring about such a result cannot, we submit, be accurately described as one providing a method of adjusting damages or as a provision which "furnishes a ready and convenient standard for measuring the loss" (Opinion of District Court, R. 183).

In *Railroad Company* v. *Lockwood*, *supra*, this Court announced the following conclusion:

> "That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants" (p. 384).

This Court has strictly adhered to that conclusion and has frequently restated it in later cases:

> "That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary" (*Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509).

> "An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration" (*Kansas Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 650).

> "In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused

> by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence" (*Boston & Maine R. R.* v. *Piper*, 246 U. S. 439, 445).

See also,

Calderon v. *Atlas S. S. Co.*, 170 U. S. 272.

The public policy of this country is directed at results and not at methods. It is immaterial what form of words is employed to produce the forbidden result.

Indirect attempts have sometimes been made by ocean carriers to exempt themselves from liability for loss due to their negligence by providing that all questions arising under a bill of lading shall be determined by a specified foreign law under which the exemption sought is valid. This Court has, on grounds of public policy, held void such indirect attempts to do what cannot be accomplished directly. *The Kensington*, 183 U. S. 263.

Likewise in the *Piper* case, *supra*, the bill of lading provision was innocent enough on its face; it merely provided that the damages due to delay in the transportation of livestock should be measured by the amount which the shipper actually expended for food and water during the period of detention. Nevertheless, this Court declared the clause void as an attempt to protect the carrier from liability for his own negligence.

In the present case the result of clause 11 is that the carrier may negligently lose or destroy a portion of the property entrusted to its care without any liability whatever, so long as the portion which remains has a value at destination equal to the invoice value of the entire shipment.

In considering the effect of this clause, it must be borne in mind that much of the world's commerce moves under contracts made long in advance. The contract price of goods shipped today may have been fixed six months or a year ago. The invoice price naturally will be in accordance with the contract, and may have very little relation to prices obtaining either at the port of shipment or the port of destination on the date of shipment or arrival. It is clear, however, that the clause will normally operate in favor of the carrier. This was pointed out by the Supreme Court of the State of Pennsylvania in *Rupped* v. *Allegheny Valley R. R. Co.*, 167 Pa. 166; 31 Atl. Rep. 478. There the bill of lading provided that loss or damage to merchandise

> "shall be computed at the value of the property at the place and time of shipment under this bill of lading unless a lower value has been agreed upon."

The court said (p. 480):

> "How is the loss to be measured? The contract stipulates that the market price of the potatoes at Pittsburgh at date of shipment is to be the measure of damages."
>
> * * * * * * * *
>
> "This stipulation, it is urged, is not to relieve the carrier from any liability for negligence, but was adopted to avoid the uncertainty

which would otherwise be incident to proper proof of loss. If this were the object of the stipulation, there is no public policy which would avoid it. *The trouble with this view, however, is that the condition is palpably a limitation of or reduction on the loss of the shipper. The sole inducement to shipment of marketable commodities is the higher price at point of destination. This alone creates and stimulates international, interstate, and domestic trade. Railroads and all other common carriers would have but lean incomes if this were not so. The plain effect of it is not alone the avoidance of inconvenience and uncertainty in the demand, but a restriction in the amount of it,—a reduction in the real loss. It is therefore void.*" (Italics ours.)

Even the petitioner's argument that the bill of lading will occasionally operate in favor of the consignee is open to grave question. In a time of falling prices it is scarcely to be assumed that carriers would issue a bill of lading in this form. There is no regulating body (such as the Interstate Commerce Commission) which forces ocean carriers to adhere to any particular form of bill of lading for any particular period of time. So far as the record shows, the petitioner may never have issued another bill of lading like those involved here; and it may never issue another. Under these circumstances we submit that this case should be considered from the standpoint of the operation of these bills of lading under the circumstances of this particular case; and not from the standpoint of the possible operation of similar bills of lading in some other case where the circumstances are different. There may never be such a case.

The fantastic results of clause 11 are readily apparent. If a shipment is worth one-third more at destination than at the port of shipment, the carrier may negligently destroy one-quarter of it without any liability whatever. He will enjoy a similar immunity even if his servants steal one-quarter of the goods. *Moore* v. *Duncan*, 237 Fed. Rep. 780.

The supposed benefits to the consignee would arise only in a time of rapidly falling prices. If we accept the petitioner's assumption that carriers would issue this form of bill of lading in such a period, they might, of course, be liable for enormous sums by reason of the most trivial damage. For purposes of illustration we may take the sudden collapse in the sugar market which occurred after the Great War, at a time when the previous high price had started shipments to this country from South America and the Far East. Let us assume that a bill of lading like the one involved here was issued for a cargo of 5,000 tons of sugar to be transported from Java to the United States. Let us assume that the cargo consisted of 100,000 bags weighing 100 pounds each; that all of the sugar was delivered in perfect condition, excepting that one bag was negligently dropped overboard in discharging; that during the voyage the price of sugar had declined from 20c per pound to 5c per pound. The actual loss to the consignee would be $5.00; but the carrier would be liable, under the terms of the bill of lading, for $1,500,000. Can it be argued seriously that carriers will assume any such liability; or that this is the sort of "consideration" which a shipper can be compelled to accept for waiving his right to recover his real damages? The question naturally arises what security the carriers offer for the performance of this remarkable obligation. By no means all carriers are able to respond for the large

sums which might be involved; and the question may well be raised whether their corporate powers are broad enough to permit such a contract. A further question arises whether such a contract would be enforceable in admiralty; and whether it would give a maritime lien on the vessel.

The foregoing is submitted in answer to the petitioner's argument as to the fairness and reasonableness of the clause. We submit, however, that the true answer to that argument is that no carrier would issue this type of bill of lading for a long voyage with cargo of unstable value. The best evidence of this is the fact that the reports contain no record of any litigation in which any such claim has been asserted against a carrier.

We know of no authority which sustains a clause like the present. Indeed, we have found no case where such a clause has even been considered. In *Pearse* v. *Quebec Steam-Ship Co.*, 24 Fed. Rep. 285, the bill of lading provided that "in case of damage, loss, or non-delivery, the ship-owners will not be liable for more than the invoice value of the goods". The shipowner contended that the "invoice value" referred to in this clause was the invoice value of the entire shipment, including the undamaged portion. Judge Addison Brown held that this was not the meaning of the clause; and that if so construed it would be void as against public policy. We quote from his opinion as follows:

> "The respondents contend that the stipulation of the bill of lading should be construed as limiting their responsibility to the invoice value of the shipment as a whole; and that the carriers are not to be liable for any loss or damage, provided the shipper ultimately real-

> izes at the port of destination the whole invoice value. Upon that theory the respondents in this case would not be liable at all, because the owner has realized upon the whole shipment considerably more than the invoice value of the whole, notwithstanding the damage to three of the fourteen bales" (p. 287).
>
> * * * * * * * *
>
> "When it is stipulated that in case of damage or loss, the ship-owner 'will not be liable for more than the invoice value of the goods,' the goods referred to are plainly the goods damaged, and those only; otherwise the clause would not be valid. The law makes the carrier liable for the loss or damage of *any* goods through his own negligence. Any stipulation that would annul this liability is void" (p. 288).

In the *Pearse* case, the shipowner sought to do what the petitioner seeks to do here, *i. e.*, to off-set against any loss on damaged goods the amount of any profit which the consignee may have realized on sound goods. Judge Brown ruled that an agreement which would have this effect would be unlawful. In the fifty years which have intervened since that decision, the petitioner seems to be the first shipowner to challenge Judge Brown's statement of the law.

The petitioner's argument that its position is supported by the decision of this Court in *Gulf, Colorado, etc. Ry.* v. *Texas Packing Co.*, and by certain decisions of the Circuit Court of Appeals for the Second Circuit, is sufficiently answered in the opinion of the latter court in this case (R., p. 197). As to the *Gulf, Colorado* case, see also, *infra*, page 22.

POINT III.

Even a reasonable valuation clause is invalid unless the shipper has the alternative of shipping without limitation as to value in consideration of a higher rate of freight.

Heretofore, we have considered clause 11 from the standpoint of its reasonableness. Our argument has been that even if this clause had been accepted by the shipper voluntarily, in the exercise of a free choice between accepting this clause or having it eliminated in consideration of a higher freight rate, the clause would still be invalid because it produces an effect forbidden by law,—*i. e.*, it wholly exempts a common carrier from liability for a loss caused by his negligence.

We shall now discuss the clause in a different aspect. We shall now point out that even if the clause could be regarded as a reasonable method of placing an agreed valuation on the respondent's merchandise, it would still be invalid unless supported by a choice of rates.

At the outset we desire to define the precise scope of our argument. Many of the cases cited by the petitioner have no bearing whatever on the issue presented here. In the interest of brevity we shall not discuss these cases individually, but shall point out, by classes, why they are irrelevant.

We may first eliminate all cases which do not involve negligence. Both the Harter Act and the public policy of this country are limited to cases in which the carrier seeks exemption from his own negligence or that of his servants. There has never been any statute or public policy which prevented a carrier

from stipulating for exemption from liability for damage by fire, sea perils and other losses to which his negligence did not contribute. This is clearly pointed out in the opinion of this Court in *Railroad Co.* v. *Lockwood*, 17 Wallace 357, at pages 379-380. This distinction eliminates the following cases cited by the petitioner:

> *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 430, 431;
> *Clark* v. *Barnwell*, 53 U. S. 272;
> *York Company* v. *Central Railroad*, 3 Wall. 107;
> *Bank of Kentucky* v. *Adams Express*, 93 U. S. 174;
> *Railroad Co.* v. *Pratt*, 22 Wall. 123.

Even where the loss is due to the carrier's negligence, this Court has held that certain classes of stipulations do not tend to exempt the carrier from liability for such negligence and, therefore, are valid without special consideration. Thus, the carrier may stipulate for the benefit of any insurance effected upon the goods, *Phoenix Ins. Co.* v. *Erie & Western Transp. Co.*, 117 U. S. 312; and may require notice of claim to be filed within a reasonable fixed period, *Express Co.* v. *Caldwell*, 21 Wall. 264; *Queen of the Pacific*, 180 U. S. 49.

Clauses fixing a conventional valuation or limitation upon the value of the goods carried have been the subject of frequent consideration by this Court. A very definite rule has been laid down with respect to such clauses. The rule is that where the assured has a free choice in the matter and agrees to a conventional valuation in consideration of a lower rate of freight, the clause will be upheld on the ground

of estoppel; otherwise such clauses are invalid. We believe that few rules have been more clearly stated and more firmly established in this Court than the foregoing.

One of the early statements of the rule is found in *Hart* v. *Pa. R. R.*, 112 U. S. 331. In that case this Court said:

> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value" (p. 340).
>
> * * * * * * * *
>
> "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire* v. *New York Central R. R. Co.*, 98 Mass. 239, 245, and cases there cited" (p. 343).

It will be observed from the foregoing quotation that the validity of the valuation clause is based on the principle of estoppel. This Court and the lower Federal courts have repeatedly pointed out that this is the essential ground upon which such clauses are sustained. As the carrier has afforded the shipper a choice of two rates, and the shipper has chosen the lower rate, based upon his representation that his merchandise is worth but a limited amount and an agreement that the carrier's liability shall be limited to that sum, the shipper is estopped to set up that his goods are worth more than he has declared they were worth. It is particularly to be noted that the estoppel is the representation by the shipper concerning the value of his merchandise and his choice of a freight rate based on the value represented.

Adams Express Co. v. *Croninger,* 226 U. S. 491, 509-10;

Boston & Maine R. R. v. *Piper,* 246 U. S. 439, 443-5;

Amer. Ry. Exp. Co. v. *Lindenburg,* 260 U. S. 584, 592;

A. C. Lawrence Leather Co. v. *Compagnie Generale Transatlantique,* 18 Fed. (2d) 930 (C. C. A. 2nd Cir.);

The Caledonier, 42 Fed. (2d) 856 (C. C. A. 2nd Cir.).

With respect to these and similar authorities, the petitioner says:

> "While it is true that in most of those cases clauses limiting liability to a stated value were held to be valid where the shipper had the option to ship under a rate preserving the un-

> limited common law liability of the carrier, we do not believe that the process of reasoning by which this Court arrived at its determination sustaining such a limitation under such circumstances justifies a conclusion that such an alternative was laid down as a condition for sustaining it" (Petitioner's Brief, pp. 14-15).

This same argument was made to this Court some fifteen years ago in almost identical terms, in the case of *Union Pacific Railroad Co.* v. *Burke*, 255 U. S. 317. After stating the petitioner's argument and rejecting it, the opinion in that case restates in the clearest terms the rule that valuation clauses in bills of lading issued by common carriers are valid only where the rate is "tied to the release". Following an explanation of the theory on which valuation clauses have been sustained, this Court said:

> "The petitioner admits all this, but contends that it has never been held by this Court that such choice of rates was essential to the validity of valuation agreements, and, arguing that they should be sustained unless shown to have been fraudulently or oppressively obtained, it affirms the validity of the agreement in the Yokohama bill of lading, and cites as a decisive authority *Reid* v. *American Express Co.*, 241 U. S. 544.
>
> "With this contention we cannot agree.
>
> "This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U. S. 331, 338 and 246 U. S. 439, 444, *supra*), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice

of rates was given—where 'the rate was tied to the release' " (255 U. S. p. 321).

* * * * * * * *

"Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception" (255 U. S. pp. 322-3).

In view of the striking parallel between the argument of the petitioner in this case and the argument of the petitioner in the *Burke* case, we cite the language of this Court, above quoted, as our answer to this argument.

In answer to the petitioner's attempted distinction based on the argument that clause 11 is not a limitation of liability but a valuation agreement, we call attention to the repeated use of the phrase "valuation agreements" in the above quotation.

At this point in our argument it becomes necessary to distinguish another class of cases upon which the petitioner relies. These are cases in this Court and the lower Federal courts involving railroad bills of lading. We think it will be found that in most if not all of such cases the tariffs afforded the shipper an alternative rate of freight, under which the carrier's liability would be unlimited. So far as our experience goes, such a provision has been included in practically all railroad tariffs filed during the last twenty years. We have not searched the original tariffs in all the cases to which the petitioner refers, but we have ascertained the facts in two cases which we believe are typical.

The petitioner quotes the following passage from the opinion of this Court in *Chicago, etc. R. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99:

> "'We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it *does not necessarily prevent a recovery of the full actual loss,* and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule.' (Italics supplied.)" (Petitioner's Brief, p. 12.)

This language is quoted as supporting the petitioner's argument that no choice of rates need be given to support the validity of a true valuation clause as distinguished from a clause merely limiting the carrier's liability.

In the *McCaull-Dinsmore* case, the bill of lading provided that any loss or damage should be computed "on the basis of the value of the property at the place and time of shipment"; it did not provide for computing damages on the value of the "entire shipment", as in the present case. In this branch of our argument, however, the important point about the case is that the shipper actually had a choice of rates. We have examined the record in the *McCaull-Dinsmore* case and quote as follows from the stipulation of facts on which that case was submitted:

> "That said contract was a part of the published tariffs legally published and filed with the Interstate Commerce Commission; that said tariffs provided, among other things, a rate of transportation based on and controlled by said bill of lading or contract; *and said tariff fur-*

> *ther provided that in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a higher rate of transportation was provided by said tariffs.*" (Italics ours.)

From the foregoing it is apparent that the remarks of this Court in the *McCaull-Dinsmore* case are in no way inconsistent with the rule laid down in *Union Pacific R. R. Co.* v. *Burke*. The Court was discussing a case in which a choice of rates was given. On that assumption this Court agreed that the clause was not unreasonable and was only void because in violation of the Cummins Amendment.

The petitioner also cites the case of *Duplan Silk Co.* v. *Lehigh Valley R. R. Co.*, 223 Fed. 600. The record in that case includes the carrier's tariff, which contained the following language:

> "In order that the consignor may have the option of shipping property, either subject to the terms and conditions of the Uniform Bill of Lading hereinafter set forth or under the liability imposed upon common carriers by the common law and the federal and state statutes applicable thereto, this official classification provides for different rates and for different forms of Bills of Lading to be used, respectively, as the consignor may elect to have a limited liability or a common carrier's liability service."

The tariff also provided that if a shipper elected not to ship under the Uniform Bill of Lading, the merchandise

> "will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several states in so far as they apply."

We are satisfied that similar tariff provisions existed in almost all cases involving railroad transportation during the last twenty years, and the decisions in such cases must be read against that background. Accordingly, they have no bearing on the question now under discussion, *i. e.*, the necessity for a choice of rates to support the validity of a valuation clause.

A number of the cases which petitioner cites are distinguishable also on another ground, namely, that the validity of the valuation clause was not in question. In these cases both parties were satisfied with the clause and the court, therefore, did not pass on its validity. In this class are the following cases:

> *Pa. R. R. Co.* v. *Olivit Bros.*, 243 U. S. 574;
> *Phoenix Insurance Co.* v. *Erie and Western Transportation Co.*, 117 U. S. 312, 322;
> *Gulf, Colorado etc. Ry.* v. *Texas Packing Co.*, 244 U. S. 31;
> *The Oneida*, 128 Fed. 687, 689.

In the case of *The Oneida*, the court said, at page 689:

> "The commissioner commenced his computation by fixing the value of the cotton at the amount stated in the invoice. Both parties appear to be content with this basis of computation, at least there is no exception challenging its accuracy."

The District Court cited several decisions in the lower Federal courts which we think are clearly distinguishable. In *Inman & Co.* v. *Seaboard Air Line R. Co.*, 159 Fed. 960, 968, and *Springfield Light, Heat & Power Co.* v. *Norfolk & W. Ry. Co.*, 260 Fed. 254,

257, 261, the opinions indicate that there was in fact a choice of rates.

In *The Asuarca*, 13 Fed. (2d) 222, the bill of lading provision was that the carrier

> "shall only be obliged to indemnify * * * for actual and intrinsic value of goods loaded, ascertained from invoices of origin * * *" (p. 233).

We think this language constitutes a mere limitation of the carrier's liability, and, hence, the decision in the *Asuarca* must be regarded as overruled by the later decision of the Circuit Court of Appeals for the Second Circuit in *The Merauke*, 31 Fed. (2d) 974.

In dealing with a question which has been so definitely and repeatedly decided by this Court, we deem it unnecessary to discuss in detail the decisions of the State Courts. The fact is that there is a definite conflict between the decisions in the various States. The following cases hold that a valuation clause based on invoice value or market value at point of shipment is invalid, at least where no choice of rates is given:

St. Louis, Iron Mt. & S. Ry. Co. v. *Coolidge*, 83 S. W. 333, 335 (Sup. Ct. Ark.);
Illinois Central R. Co. v. *Bogard*, 27 So. 879, 880 (Sup. Ct. Miss.);
Rhymer v. *D. L. & W. R. R. Co.*, 27 Pa. Super. Ct. Rep. 345, 347 (Super. Ct. Pa.);
So. Pac. Co. v. *D'Arcais*, 64 S. W. Rep. 813, 14 (Ct. Civ. App. Texas);
Ft. Worth & D. C. Ry. Co. v. *Greathouse*, 17 S. W. 834, 837 (Sup. Ct. Texas);

Ruppel v. *Allegheny Valley R. R. Co.*,
167 Pa. 166; 31 Atl. Rep. 478;
Straus & Co. v. *Canadian Pacific Ry. Co.*,
254 N. Y. 407.

In *Denver & R. G. R. Co.* v. *Peterson Grocery Co.*, 59 Colo. 125, one of the cases cited by the petitioner, the conflict in the State court decisions is referred to as follows:

> "There is a conflict in the authorities concerning the validity of this clause. Mississippi, Pennsylvania, Texas and Arkansas have held that such a stipulation is invalid for the reason that it would relieve the carrier from a part of its liability occasioned through its negligence. *Railroad* v. *Bogard*, 78 Miss. 11, 27 South. 879; *So. Pac. Co.* v. *D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813; *I. & G. N. Ry. Co.* v. *Anderson*, 3 Tex. Civ. App. 8, 21 S. W. 691; *Ruppel* v. *Allegheny Valley Ry. Co.*, 167 Pa. 166; *Rhymer* v. *D. L. & W. R. Co.*, 27 Pa. Super. Ct. 345; *St. Louis, Iron Mountain & So. Ry. Co.* v. *Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21, 3 Ann. Cas. 582; vol. 4, Elliott on Railroad (2d Ed.), sec. 1510a; vol. 1, Hutchinson on Carriers (3d Ed.), sec. 430."

The District Court and the petitioner cite a number of State Court decisions as supporting the contrary view. Apparently some of these cases do support valuation clauses (where the valuation applies to the damaged goods and not to the entire shipment) without a choice of rates. These cases must be examined with considerable care, however, as in some of them it is not at all clear whether or not a choice of rates was in fact given, or whether that question was considered material.

The decisions in the State of New York are particularly interesting. In *Kilthau* v. *Int. Mercantile Marine Co.*, 245 N. Y. 361, the New York Court of Appeals declared that a clause limiting recovery to invoice value, without a choice of rates, was void. In the course of its opinion, however, the court said:

> "If the parties here had agreed that such invoice value should be the basis for fixing damages in all cases, it might perhaps be said that the valuation and consequent limitation was not arbitrary and should be enforced."

When the question actually came up for decision, however, the court held that a clause which made the value at point of shipment the basis of adjustment, as distinguished from a mere limit of recovery, was void in the absence of a choice of rates. In *Straus & Co.* v. *Can. Pac. Ry. Co.*, 254 N. Y. 407 (decided in 1930), the bill of lading clause was as follows (p. 415):

> "All claims for loss of or damage or injury to any goods or property for which the carriers are liable under the terms hereof *shall be adjusted upon the basis of the market value of the said goods or property or of goods or property of the same nature and quality at the place and time of original shipment* unless the invoice or declared value of the said goods or property shall be less than such market value, in which case such invoice or declared value (whichever shall be the less) shall be the maximum, provided, however, that in no case shall the carriers be liable for or in respect of the said goods or property beyond the sum of $10.00 per cubic foot nor in any case exceeding $100.00 for any one package, or any article not enclosed in a package unless a higher value

> shall have been declared in writing at the time of shipment and *ad valorem* freight paid thereon." (Italics ours.)

The court said (p. 416):

> "The bill of lading does not state the value of the silk. The attempt to arbitrarily limit liability—to the value of the silk at the time and place of shipment in the event that the value was declared and an ad valorem rate paid, and otherwise to $100 per package—was without consideration. Under the wording of the bill of lading, *the shipper could not, in any event, recover more than the value of the goods at the time and place of shipment, even though it placed a higher valuation thereon and paid an ad valorem rate. Such attempted absolute limitation of liability, regardless of the rate paid, makes the clause void.*" (Italics ours.)

The decision in the *Straus* case was unanimous. The Bench included Mr. Justice Cardozo, of this Court, then Chief Justice of the New York Court of Appeals. With respect to this decision the District Court, in the present case, said:

> "I have not overlooked *Straus* v. *Canadian Pacific R. Co.*, 254 N. Y. 407. That case seems to support the libellant's argument, but it is opposed to the great weight of authority" (R., p. 184).

In connection with the New York decisions, it is interesting to note that the intimation above quoted from the *Kilthau* case appears to have been the basis of a similar but somewhat fainter intimation in the case of *The Merauke*, 31 F. (2d) 974, 975, upon which the petitioner relies (R., p. 195). We think it is a

fair assumption that the Circuit Court of Appeals for the Second Circuit would attach at least as great weight to the decision in the *Straus* case as they attached to the intimation in the *Kilthau* case.

POINT IV.

The question presented here is not one of degree. The contract upon which the petitioner relies is lacking in the element of free choice which this Court has held essential to such agreements.

The petitioner argues that Clause 11 is reasonable, and based on adequate consideration. True, the consideration is not the same which this Court has approved in earlier cases (*i. e.* a choice of rates); but, the petitioner says, it is just as good or even better. In some cases the consignee may get less than his actual commercial loss, and in some cases nothing, as in the present case; but in other cases he may get more,—a veritable wind-fall. Thus, the petitioner says:

> "At most, however, the only exemption the contract could be said to provide for was an exemption from payment of *fortuitous profits* that might result from market fluctuation during transit, and for that exemption it gave the shipper compensating protection against *fortuitous losses* resulting from the same cause. Why should not carrier and shipper be free to enter into such a contract? What interest of the public is served in refusal to enforce it? This is not a case where any unfair advantage has been taken of the shipper. It knew the terms of the contract of carriage, assented to them and signed the contract. It made no protest against its terms at the time of shipment or subse-

> quently prior to delivery of the goods. It not only did not protest the terms of shipment, but also presumably was satisfied with, and glad to avail itself of, the protection afforded it thereby" (Petitioner's Brief, p. 42).

Some shippers, of course, may only want the assurance of collecting their actual damages, and may not be willing to wager this right against a chance of collecting something to which they have no legal or moral claim. They may think, like the court which decided the *Ruppel* case (*supra*, pp. 9-10), that the odds are too strongly in favor of the carrier. They may prefer to take their own precautions against an adverse market, and look to the carrier only for the performance of his proper duties as such. With these conservative ideas the petitioner evidently has little patience. It refers to this respondent in terms which would be more suitable if applied to the patron of a gambling-house, who had stopped payment on the check given for his losses. We quote from the petitioner's brief (p. 44):

> "To allow him to avoid the contract when the event of shipment shows it to have been to his advantage to do so, a contract entered into without protest of any kind by him at the time of, or subsequent to, shipment, is, it would seem, *to reward him for a form of duplicity or deceit, and the only interest served that of his cupidity.*" (Italics ours.)

The answer to this argument is that it rests upon a false assumption. It assumes that Clause 11 is an agreement freely entered into by parties standing on an equal footing. The fallacy of this assumption was pointed out by this Court many years ago in *Railroad*

Co. v. *Lockwood, supra.* We quote from the opinion in that case:

> "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business.
>
> * * * * * * *
>
> "If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept." (17 Wall. (U. S.) 379.)

The foregoing language applies with peculiar force to the present case. The bills of lading are in English (O. R., pp. 139-145); they were issued in Italian ports to Italian shippers, who probably could not have read

them even if they had thought of doing so. To read the document would be useless in any event, for they had no alternative but to accept it.

The language above quoted from the *Lockwood* case gives the background of the doctrine announced in that case and so clearly restated in *Union Pacific R. Co.* v. *Burke*, *supra*. Valuation clauses are upheld not merely because they are reasonable but because the shippers, in the exercise of a free choice, have agreed to them, and by representing that their goods have a certain value have estopped themselves from claiming a greater value. This Court has never undertaken to say how much, or on what consideration, a common carrier may cut down his common-law liability for damage due to his own negligence. On the contrary, this Court has held common carriers strictly to their common-law liability for their own negligence, recognizing that valuation clauses are an exception which can be sustained only on the ground that the shipper has a free choice in the matter. In the cases where valuation clauses have been upheld, it was the shipper, not the court, who decided that the clause was reasonable; and having made his choice, freely and voluntarily, he was estopped to take an inconsistent position later.

> "Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception." (*Union Pacific R. Co.* v. *Burke*, 255 U. S. 317, 322-3.)

In the present case the basis for an estoppel is wholly lacking. The shipper made no representation

and had no choice in the matter. Under these circumstances the question whether Clause 11 is reasonable does not arise. It is void because it cuts down the petitioner's liability for its own negligence.

POINT V.

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

D. ROGER ENGLAR,
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HENRY N. LONGLEY,
F. HERBERT PREM,
On the Brief.

SUPREME COURT OF THE UNITED STATES.

No. 521.—October Term, 1934.

Steamship "Ansaldo San Giorgio I," Societa Nazionale di Navigazione, Claimant, Petitioner, *vs.* The Rheinstrom Brothers Company. } On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

[March 4, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

Three shipments totalling 4266 barrels of cherries in brine were loaded at Italian ports upon the S. S. Ansaldo San Giorgio I consigned to the respondent at ports in the United States. The cargo arrived in bad condition due to improper stowage and the respondent filed a libel to recover damages. Trial in the District Court resulted in an interlocutory decree for the respondent.[1] The cause was referred to a commissioner, who found that the containers and the cherries were in good condition when shipped, 162 barrels had become a total loss and there was additional damage equivalent to a loss of 419 barrels. He computed the damages on the basis of the market value of the goods at destination on the date of arrival. The petitioner resisted any award, relying on the following clause in the bills of lading: "In the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred." The proof was that, owing to favorable market conditions existing at destination, the market value of all the merchandise which remained, sound as well as damaged, exceeded the values stated in the invoices, plus freight. The commissioner held the quoted clause an invalid stipulation exempting the carrier from liability for negligence, as there was no showing that the shipper had been offered a choice of rates adjusted according to the value placed upon the goods. Upon exceptions, the district

[1] 1928 A. M. C. 109. The Circuit Court of Appeals affirmed the decree, 26 F. (2d) 1016, and this court denied certiorari, 278 U. S. 633.

court accepted the commissioner's findings, but held the clause a reasonable and lawful agreement for measuring damages, and denied the respondent any recovery.[2] The Circuit Court of Appeals reversed the decree and affirmed the computation of damages submitted by the commissioner.[3] Though no conflict of decision in the federal appellate courts is cited, and the novelty of the question presented would not, in the absence of general importance, move us to grant certiorari, we issued the writ[4] because the decision below is alleged to conflict with principles established by our decisions.[5]

The question presented is whether the clause appearing in the bill of lading is valid and constitutes a defense to the shipper's claim for negligent damage to a portion of the consignment.

A common carrier is answerable for loss or damage to the goods transported from any cause save the act of God or the public enemy. The measure of the shipper's recovery is normally the market value of the goods at destination, in like condition as they were when shipped, on the date when they should have arrived.[6] The carrier may exempt himself by contract from liability for the consequences of events beyond his control,[7] but he cannot contract for relief from liability for his own negligence, even though he give a special consideration for an agreement to that effect.[8]

Two so-called valuation clauses have been in frequent use. One is a true limitation agreement. It recites that a sum named in the bill of lading is the agreed value of the goods, or their value per unit or per package, in the absence of the shipper's declaration of a higher value; that the rate is fixed with reference to the specified value, and if a greater be declared a higher rate will apply; that in consideration of the rate to be charged, the

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[2] 3 F. Supp. 579.

[3] 73 F. (2d) 40.

[4] 293 U. S. — .

[5] See Rule 38, 5 (b) of this court.

[6] *St. Johns N. F. Shipping Corporation* v. *S. A. Companhia Geral, etc.*, 263 U. S. 119, 125, and authorities cited.

[7] *Clark* v. *Barnwell*, 12 How. 272; *York Company* v. *Central Railroad*, 3 Wall. 107; *Bank of Kentucky* v. *Adams Express Company*, 93 U. S. 174; *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427.

[8] *Railroad Company* v. *Lockwood*, 17 Wall. 357, 384; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 650; *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439, 445.

carrier's liability for loss or damage shall be limited to the stipulated value. In case of loss or damage this clause enures to the carrier's, but not to the shipper's benefit. The latter can in no event recover more than his actual loss, but may have to take much less. The damages are computed in the usual way without reference to the stipulation, but, if when so computed they exceed the agreed limit of value, no recovery of the excess may be had.[9] Such a stipulation, we have said, is not enforcible unless the shipper, for agreeing to such a limitation of the carrier's liability, receives a consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation;[10] or, as has been said, the rate is tied to the release.[11] Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence.[12] The agreement as to value in consideration of carriage at the lower rate thus obtained is held to estop the shipper from demanding damages in excess of the agreed value.

The other is a true valuation clause. It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment. Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier, and may lessen the carrier's normal liability if they should appreciate prior to that time. This and other federal courts have decided a number of cases in which it appeared that a bill of lading embodied such a stipulation. In some the parties treated the clause as binding and no decision was made on the point.[13] In one case it was held to be prohibited by the Cummins

[9]*Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331; *Duplan Silk Co.* v. *Lehigh Valley R. Co.*, 223 Fed. 600, 603.

[10]*Hart* v. *Pennsylvania Railroad Co., supra; Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278; *Boston & Maine Railroad* v. *Piper, supra; Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317.

[11]*Union Pacific R. R. Co.* v. *Burke, supra*, 321.

[12]*Hart* v. *Pennsylvania Railroad Co., supra*, 340; *Kansas City Southern Ry. Co.* v. *Carl, supra*, 649-50.

[13]*Phoenix Insurance Co.* v. *Erie and Western Transportation Co.*, 117 U. S. 312, 322; *Pennsylvania Railroad Co.* v. *Olivit Bros.*, 243 U. S. 574; *Gulf, Colorado, &c. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31; *The Oneida*, 128 Fed. 687.

Amendment to the Interstate Commerce Act,[14] but its validity in cases not controlled by that enactment was not decided. In several cases there are expressions, not necessary to the decisions, to the effect that it is a reasonable and lawful provision for measuring damages.[15] In none was there a decision that a choice of rates was essential to its validity, although there are indications of that view.[16] The contention is that as no alternative rate applicable to liability measured by full value at destination was here afforded the shipper the clause is void. The weight of authority in the state courts seems to be in favor of upholding the clause even though no such choice is open to the shipper.[17] There is much to be said in favor of an agreement by which the parties adopt an agreed value as a measure of recovery for loss or damage to goods not delivered by the carrier or damaged in transit. We have no occasion to determine the requirements or the validity of such a contract, as we are of opinion, that whatever is the right view as to such a valuation clause, the one here employed would be unreasonable and contrary to public policy even if supported by a valid consideration, and cannot estop the respondent to claim damages measured according to the general rule. The contract plainly requires that if, after deduction of all loss and damage, the remaining cargo, in its then condition is worth more at destination than the whole cargo at place and time of shipment, the carrier shall be wholly exonerated. As pointed out by the court below if there were a short delivery of fifty cases out of a shipment of one hundred cases, but the market value of the goods delivered at the port of destination were equal to the invoice value of the hundred cases, plus freight, the carrier would pay nothing for negligent loss of half the shipment. Such an agreement is against public policy as its effect is to relieve the carrier from the consequences of its negligence.[18]

The judgment is

Affirmed.

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[14] *Chicago, M. & St. P. Ry Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97.

[15] *Phoenix Insurance Co.* v. *Erie and Western Transportation Co., supra; Gulf, Colorado, &c. Ry. Co.* v. *Texas Packing Co., supra*, 36; *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co., supra.*

[16] *Western Transit Co.* v. *Leslie & Co.*, 242 U. S. 448, 453-4; *Union Pacific R. R. Co.* v. *Burke, supra*, 320, 321, 323.

[17] See *The Ansaldo San Giorgio I*, 3 F. Supp. 579, 581.

[18] Compare *Pearse* v. *Quebec SS. Co.*, 24 Fed. 285, 287, 288.